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No. - .

In the

Supreme Court of the United States.

OCTOBER TERM, 1984.

STEPHEN GIBBS,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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Questions Presented for Review.

1. Whether a "presumption of continuing involvement" in an ongoing conspiracy may properly, consistently with the safeguards provided by Fed. R. Evid. 801(d)(2)(E) and the Due Process Clause of the Fifth Amendment to the United States Constitution constitute the basis of a judicial finding of membership in the conspiracy at the time of the making of the co-conspirator declarations at issue such as to satisfy the "fair preponderance of independent evidence" standard governing the admissibility of co-conspirator declarations.

2. Whether the Confrontation Clause of the Sixth Amendment to the United States Constitution requires that co-conspirator hearsay declarations be subjected to the "necessity" and "reliability" analysis mandated by *Ohio* v. *Roberts*, 448 U.S. 56 (1980), in addition to the scrutiny required under Fed. R. Evid. 801(d)(2)(E); i.e., whether the admission into evidence of co-conspirator declarations which satisfy Rule 801(d)(2)(E) may nonetheless violate a defendant's rights under the Confrontation Clause.

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STEPHEN GIBBS,
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v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Petitioner Stephen Gibbs prays that this Honorable Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, sitting en banc, entered in this case on June 15, 1984.

Opinions Below.

Petitioner's appeal was initially heard by a panel of the Third Circuit, which issued its opinion reversing petitioner's conviction on March 22, 1983. This opinion was vacated on May 19, 1983, upon the granting of respondent's petition for rehearing en banc. The en banc opinion of the Court of Appeals for the Third Circuit, which reinstated petitioner's conviction, along with the dissenting opinions of Rosenn, J. (with whom Aldisert and Gibbons, J.J., joined) and Seitz, C.J., are reported at F.2d (3d Cir. 1984), and are reproduced herein in the Appendix at 1a-44a. On July 11, 1984, the Court denied a petition for rehearing en banc.

Jurisdiction.

The judgment of the United States Court of Appeals for the Third Circuit (en banc) was entered on June 15, 1984. A timely petition for rehearing en banc was denied on July 11, 1984.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional and Other Provisions Involved.

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property without due process of law."

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

Federal Rule of Evidence 801(d)(2)(E) provides:

> (d) Statements which are not hearsay
> A statement is not hearsay if
> * * * *
> (2) Admission by party opponent
> The statement is offered against a party and is . . .
> (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Statement of the Case.

Petitioner was convicted in November, 1981, of conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 846. He was sentenced to a term of ten years' imprisonment.

A. *The Quintiliano Conspiracy.*

Neither the existence or the essential gestalt of the Quintiliano conspiracy were controverted by petitioner at trial, and the statement of facts contained in the en banc opinion, see Appendix at 3a-4a, suffices to provide the necessary background for the explication of the evidence against Gibbs.

B. *Evidence of the Appellant's Membership in the Quintiliano Conspiracy: Appellant's Own Acts or Statements.*

On April 7, 1980, Gibbs traveled to the Philadelphia International Airport and was met by David White, who had volun-

teered to perform this service for Quintiliano.[1] White never again met, saw or talked to Gibbs after flying him to his April 7 meeting with Quintiliano. Bilella never met, saw or talked to Gibbs.[2]

The only other proof *aliunde* the co-conspirator hearsay relevant to whether the petitioner was a member of Quintiliano's conspiracy concerned telephone calls placed to Gibbs' home from the Quintiliano residence.[3]

C. *Proof of the Appellant's Membership in the Quintiliano Conspiracy: The Testimony of White and Bilella as to Quintiliano's Statements about Petitioner.*

Bilella testified that Quintiliano told him several days before October 4-5, 1980, that he had contracted to sell his anticipated

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[1] White took Gibbs to Atlantic Aviation, a private airport contiguous to the principal one, and then flew him to a nearby airport where he met Quintiliano. White had notified Agent Miller of the impending meeting, and Miller arranged to have other law enforcement officers surveil the petitioner. White never testified to any inculpatory admission by Gibbs, and indeed, declined an invitation to lunch with Gibbs and Quintiliano. Surveillance officers testified to observing the petitioner meet and subsequently lunch with Quintiliano, then travel with Quintiliano to the Quakerstown Airport where they looked inside the plane and then at its fuselage, and finally, after exiting the airport in Quintiliano's car, Gibbs was seen to look around, as did Quintiliano, during a period of evasive driving by Quintiliano. See Appendix at 5a, 12a-13a, 28a.

[2] Indeed, no witness observed or communicated with Gibbs after April 7, 1980, i.e., for six months prior to the attempted Quintiliano importation.

[3] Five of these thirteen calls preceded the April 7 visit, one was on May 10, four were in September and three were in October. There was no direct evidence of who placed any of the thirteen calls, of who received them, and of who was residing or was present at the Brookline residence at the times of any of the thirteen calls, nor was there any independent evidence of their contents. Also admitted was testimony regarding three calls on October 4, 1980, to RAM Broadcasting Co., a telephone service which received messages for 4,000 customers in 1980 and signaled the existence of such messages by beeping the telephoned customer. See Appendix at 8a-9a, 29a-30a.

marijuana shipment to the "Florida" people, i.e., the "Cubans" who had offered a higher purchase price than had "Jake."[4] On October 4, at Quintiliano's house, between 6:15 and 9:00 P.M. Bilella observed an angry conversation between Quintiliano and Rizo over the purchaser's intent to demand delivery of the marijuana prior to payment, and then heard Quintiliano tell Rizo that he had telephoned "Jake" who had offered to "try to make the necessary arrangements" to acquire the marijuana, which had become newly available as a result of the anticipated default by the pre-arranged buyers, Rizo's principals. See Appendix at 6a-8a, 29a-30a.

White testified that on April 6, 1980, Quintiliano told him that "Jake," a potential marijuana purchaser, was coming to see Quintiliano the next day. White testified that while at Quintiliano's residence on October 4-5, 1980, Quintiliano related to him the substance of four[5] purportedly contemporaneous telephone conversations, first with his Miami bosses in which they instructed him to obtain full payment prior to distributing the marijuana, followed by a call to Jake in which Jake offered to purchase the marijuana contingent upon his obtaining the necessary funds on the next banking day (i.e., October 6), then two additional calls to the Miami contingent wherein he was instructed to reject both Jake and the Cubans unless they were prepared to make full payment prior to delivery. White averred his certainty that these calls transpired during the period of time he was at Quintiliano's house, i.e. between 11:00 P.M. on October 4 and 12:30 A.M. on October 5. Rizo was present during these conversations. See Appendix at 7a-8a.

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[4] "Jake" was identified at trial as petitioner Gibbs.

[5] White also testified to being present when Quintiliano instructed his brother Jerry to call Jake from a public telephone.

Conclusion.

Because of the virtually unprecedented paucity of independent evidence related to petitioner's membership in the Quintiliano conspiracy in October, 1980, the proffered co-conspirator hearsay was subject to vigorous and repeated objection, based both upon the failure of the government to satisfy its burden to demonstrate that petitioner was a member of the conspiracy at the time of the declarations such as to render the statements admissible under Fed.R.Evid. 801(d)(2)(E) and upon the separate constitutional infirmities under the Sixth Amendment confrontation clause.

Both the panel and the en banc opinions found the evidence of Gibbs' ongoing participation minimal at best, and relied on a presumption of continuing involvement, assuming the sufficiency of the April 7 encounter to satisfy the Rule 801(d)(2)(E) predicate as to conspiratorial membership at that point in time, to constitute the "fair preponderance of independent evidence" as to Gibbs' membership on October 4. The panel opinion, however, concluding that Gibbs had raised and preserved a confrontation clause issue, held that where the government had not demonstrated Quintiliano's unavailability and where the extrajudicial statements were neither sufficiently reliable nor sufficiently peripheral to justify dispensing with the unavailability requirement, it was prejudicial error to admit the statements. The Court en banc declined to reach the merits of petitioner's Sixth Amendment claims, engaging in a mechanistic and hypertechnical analysis which attached talismanic significance to the invocation of the specific term "availability" to excuse the trial court's and the government's apparent failure to comprehend that confrontation clause analysis inherently encompasses both availability and reliability issues. Two strong dissenting opinions in which four judges joined (only two of whom were members of the panel majority) found it

appropriate, given the seriousness of the issue, to reach the merits and reverse.

Reasons Why the Writ Should Be Granted.

The unprecedented erosion of protections to be afforded a criminal defendant to prevent determinations of guilt based upon unreliable extrajudicial statements of absent declarants manifested by the en banc opinion in this case is utterly antithetical to all civilized notions of fundamental fairness:

> Beginning with the defendant's brief and only appearance in Quakerstown, Pennsylvania, the Government's case against him is built upon speculative inferences, legal fiction, and double hearsay. These are joined by the fragile tissue of a judicial presumption that, once a defendant has been found to have participated in a conspiracy, he is presumed to continue to participate in it despite the lapse of considerable time, unless he produces affirmative evidence that he has withdrawn.
>
> The Government's case is grounded on meager testimony — barely sufficient under the preponderance of evidence rule of this circuit — offered as independent evidence of defendant's participation in the marijuana conspiracy as a potential buyer. On the basis of this slight, inferential, and dubious evidence the Government introduced the out-of-court hearsay declarations. To accomplish this objective the Government leaned heavily on the coconspirator rule, which is based on the legal fiction that each conspirator is the agent of the other. It has neither produced the declarant for cross-examination nor has it shown that he is unavailable. Also absent is not only direct or circumstantial evidence of guilt, but the

> procedural opportunity for fairness and the discovery of truth. The accused has been denied the fundamental right to cross-examine the out-of-court declarant. A society that values the good name and liberty of every person should not condemn anyone on such a naked amalgam of double hearsay, legal fiction, and judicial presumption.[6]

United States v. *Gibbs*, Appendix at 26a-28a (Rosenn, J., dissenting).

The employment by the court below of a presumption to bootstrap association into full-blown complicity in an ongoing conspiratorial relationship simply by virtue of the passage of time satisfies neither Rule 801(d)(2)(E) nor the due process clause. Particularly when juxtaposed against the minimal showing permitted here, the refusal to subject the co-conspirator declarations to Sixth Amendment scrutiny left petitioner to the mercies of innuendo, gossip, and manipulative displays of bravado by Quintiliano which were undoubtedly intended to further the purpose of the conspiracy and which may well have done so, the truthfulness of the content being utterly irrelevant to the purpose the statements were designed to serve. Even in the face of circumstances loudly proclaiming the potential for prevarication, Gibbs was deprived of all meaningful opportunity either to exclude the evidence from the jury's consideration or to confront the individual who had uttered the words which sealed Gibbs' fate.[7] The inescapable conclusion here is that

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[6] Judges Aldisert and Gibbons found insufficient evidence to satisfy the fair preponderance test. Appendix at 27a n.1.

[7] Both the panel and the court en banc agreed that the evidence of Gibbs' activities of April 7 would be insufficient to support a verdict of guilt beyond a reasonable doubt, suggesting that a valid jury verdict must necessarily have rested upon the damning statements of Quintiliano.

petitioner was convicted not because of what he did but because of what someone else said. The prevailing division and uncertainty in the Circuits as to the requirements of Rule 801(d)(2)(E) and the Confrontation Clause in the co-conspirator context and as to the appropriate interrelationship between the two provisions must be resolved.

Argument.

I. Application of a Presumption of Continuing Involvement to the Determination of the Admissibility of Co-Conspirator Declarations Violates Not Only Federal Rule of Evidence 801(d)(2)(E) But Also the Due Process Clause of the Fifth Amendment.

The Third Circuit requires as an essential predicate to the admissibility of co-conspirator declarations under Rule 801(d)(2)(E) that the government establish by a clear preponderance of the evidence independent of the hearsay declarations the existence of a conspiracy and the membership of the defendant in that conspiracy at the time of the making of the declarations at issue.[8] E.g., *United States* v. *Ammar*, 714 F.2d 238,

[8] The dissention among the circuits in this critical area becomes apparent even at this relatively preliminary stage. Some circuits have adopted a standard requiring "substantial evidence," independent of the statements, showing defendant's participation in the conspiracy. E.g., *United States* v. *Jackson*, 627 F.2d 1198, 1219 (D.C. Cir. 1980); *United States* v. *Grassi*, 616 F.2d 1295, 1300-01 (5th Cir. 1980). Other circuits formulate the test as one requiring a "prima facie" showing. E.g., *United States* v. *Dixon*, 562 F.2d 1138 (9th Cir. 1977), *cert. denied*, 435 U.S. 927 (1978). There is not even unanimity regarding consideration only of evidence independent of the hearsay; the Sixth Circuit permits consideration of the content of the proferred declaration in making this determination. *United States* v. *Vinson*, 606 F.2d 149, 153 (6th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

246 (3d Cir.), *cert. denied,* 104 S.Ct. 344 (1983); *United States* v. *Trowery,* 542 F.2d 623, 627 (3d Cir. 1976), *cert. denied,* 429 U.S. 1104 (1977). The determinative date in Gibbs' case was thus October 4-5, 1980. Despite the utter absence of any evidentiary bridge between Gibbs' April 7 conduct and the events of early October, a period of six months of moderately intense activity by the Quintiliano conspirators during which none of the conspirators was shown to have had any contact or communication with Gibbs, the Court of Appeals nonetheless adroitly and obligingly spanned the otherwise fatal gap in the government's proof by erecting a presumptive link utterly at odds with demonstrable reality.[9] The essential unresolved issue presented here is whether, and to what extent, the invocation of a presumption of continued involvement may satisfy the government's burden of proof under Rule 801(d)(2)(E). Petitioner herein submits that the device as ap-

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[9] Indeed, the independent evidence demonstrated not only no involvement by Gibbs but rather was highly suggestive of either of two conclusions, one, that Gibbs had refused as of April 7 or shortly thereafter to join the conspiracy or two, that Quintiliano after offering Gibbs the opportunity to participate, at some point irrevocably rejected Gibbs as the buyer in favor of the Cubans who had offered a higher price per pound and who, along with their agent Rizo, were present in or near Quakerstown, Pennsylvania on the night of October 4 prepared to consummate the transaction. Either of these two scenarios precludes Gibbs' membership on October 4. The government's theory of the case posited Gibbs as *the* buyer of the abortive marijuana shipment. Contrary to the gloss applied to the facts by the Court of Appeals, which does not comport with the transcendent reality of Gibbs' non-involvement on October 4, whether through resignation or ouster is irrelevant, the most favorable inference for the government which can be drawn here is that Quintiliano on October 4 renewed an invitation which had entirely lapsed some time before, so completely that Quintiliano had no idea as of October 4 whether Gibbs had any further interest in the shipment which had become newly available as a result of the unanticipated eleventh hour default of the expected buyers. The events of October 4 constitute *at most* discussion of whether Gibbs would join the conspiracy, a proposition wholly inconsistent with any theory of a pre-existing conspiratorial relationship such as to destroy any basis for Rule 801(d)(2)(E) admissibility.

plied by the Court of Appeals in the context of the admissibility of co-conspirator declarations contravenes the clear requirements of Rule 801(d)(2)(E) and, on the facts of Gibbs' case, denied him a fair trial and due process of law.

The presumption of continuity satisfies the due process clause only if, *when applied to the specific facts of the case in question,* it can "be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Ulster County Court* v. *Allen,* 442 U.S. 140, 166 n.28 (1979), quoting *Leary* v. *United States,* 395 U.S. 6, 36 (1969). As applied here, the proved fact, i.e., the independent evidence of Gibbs' conduct on April 7, does not in the context of the totality of the evidence render the existence of the presumed fact, i.e., Gibbs' membership in the conspiracy on October 4, more likely than not. The presumption cannot survive the *absence* of evidence of an ongoing relationship between Quintiliano and Gibbs, much less that void coupled with the weight of the evidence indicative of Quintiliano's rejection of Gibbs and alternative selection of Rizo and his principals to fill the buyer role.

Under *Allen,* the presumption of continuity retains its validity under the due process clause only insofar as the "more likely than not" conclusion remains viable upon all the specific facts and circumstances of the case in question; where *for any reason* the likelihood of the existence of the presumed fact falls below the requisite mark, the presumption is extinguished. Accordingly, the Court's reliance upon Gibbs' failure to make an affirmative showing of withdrawal is entirely beside the point. While proof of withdrawal would certainly invalidate the presumption, so too would *any* evidence, including all reasonable inferences therefrom, which sufficiently diminished the relative probabilities.

In addition to the objective facts indicating Gibbs' cessation of involvement,[10] the Court below also ignored, indeed it explicitly precluded reliance upon, the content of Quintiliano's co-conspirator hearsay statements to White and Bilella to prove his non-membership in the conspiracy on October 4.[11] Where,

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[10] The record contains substantial non-hearsay evidence that Gibbs was no longer a member of the conspiracy on October 4:

(a) Quintiliano's toll records show a virtually complete cessation of communication between Quintiliano and Gibbs subsequent to April 7, 1980; between that date and late September, 1980, the records indicate only one call to the Gibbs residence.

(b) Gibbs was not present on October 4, the date of the anticipated delivery of the marijuana, a point at which the intended purchaser might reasonably be anticipated to be on hand, as indeed, he was, i.e., Rizo. The utter absence of Gibbs or anyone associated with him from the Quakerstown area is a stark and striking reality, antithetical to any conception of a continuing role of Gibbs as the exclusive buyer. Furthermore, had Gibbs in fact remained an ongoing member, Quintiliano would have hardly found it necessary to call him in the early morning hours of October 5 to determine the status of his present interest in a marijuana purchase.

(c) Rizo, who represented the Cuban buying contingent, *was* present on October 4, not only at the airport to discuss unloading procedures but also that evening at Quintiliano's house; he was registered along with the Cubans at the George Washington Motor Inn.

(d) The discussions between Quintiliano and Rizo which followed the revelation that the Cubans had not brought the money with them, which confirmed beyond any doubt the status of the Cubans as *the* buyers, were not hearsay, in that Rizo's statements constituted, as to him, tried jointly with Gibbs, direct admissions, admissible under Fed. R. Evid. 801(D)(2)(A), and, where conversations between Quintiliano and White and Bilella regarding Rizo's purchaser status took place in Rizo's presence, the content of such conversations would be adoptive admissions as to Rizo, admissible under Fed. R. Evid. 801(d)(2)(B).

[11] Gibbs not only did not object to certain hearsay but, to the contrary, affirmatively adduced some of the evidence, not objected to by the government, of Quintiliano's statements regarding his non-membership on October 4.

The content of the contested co-conspirator statements has routinely been relied on in determining a defendant's objections that the statements were not

as here, the infirmity of the evidence in question is inherent in its content, the Court may not consistent with due process ignore the substance, which in this case contained unambiguous proof that the government had not in fact and could not sustain its burden under Rule 801(d)(2)(E) of showing that defendant was a member of the conspiracy on October 4. The Court below superimposed upon the actual demonstrable reality of Gibbs' non-involvement on October 4, a fictional rationale which entirely and unfairly obscured the truth. Upon all the specific facts of this case, the application of the presumption of continuity violated the due process principles enunciated by this Court in *Ulster County Court* v. *Allen, supra.*

The limiting factors encompassed within the scope of Rule 801(d)(2)(E) are designed to protect criminal defendants from the manifest potential for unfairness posed by the rule, " 'to protect the accused against [the] idle chatter of criminal partners as well as inadvertently misreported and deliberately fabricated evidence.' " *United States* v. *Gil,* 604 F.2d 546, 549 (7th Cir. 1979), quoting *United States* v. *Dorn,* 561 F.2d 1252 (7th Cir. 1977). See also *Anderson* v. *United States,* 417 U.S. 211 (1974); *Dutton* v. *Evans,* 400 U.S. 74 (1970); *Glasser* v. *United States,* 315 U.S. 60 (1942). The substitution of a presumption for the production of proof demonstrating the defendant's complicity at the time of the making of the statements

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in furtherance of the conspiracy. See e.g., *United States* v. *Provenzano,* 615 F.2d 37, 44-45 (2d Cir. 1980). The elimination of such evidence from consideration under *Glasser* v. *United States,* 315 U.S. 60 (1942), resulted from a legitimate fear of "bootstrapping" by the government. As such, this preclusion applies only to the offeror.

Furthermore, Quintiliano's statements regarding his rejection of Gibbs as the potential buyer may also be considered not for the truth of the matters stated but as evidence of Quintiliano's state of mind, as permitted by Fed. R. Evid. 801. The statements reflect Quintiliano's belief that as of October 4 he had no agreement with Gibbs to possess marijuana with intent to distribute and, therefore, a conspiratorial relationship between Gibbs and Quintiliano did not exist at the time of his statements.

entirely nullifies the rule's safeguards, which are constitutionally minimal at best.

The function of the compulsory Rule 801(d)(2)(E) analysis is to ensure that there exists sufficient proof *aliunde* the challenged declarations by *evidence* of the defendant's own acts and conduct to warrant a finding that the declarant stood in an agency relationship to the defendant at the time of the statement such that the declarations may be fairly attributed to defendant. Use of a presumption in lieu of affirmative evidence entirely vitiates the rule and permits an impermissible bootstrapping analogous to that condemned in *Glasser* v. *United States*, 315 U.S. 60, 75 (1942). In Gibbs' case, that bootstrapping transformed an equivocal and ambiguous episode of association with a conspirator into proof beyond a reasonable doubt of conspiratorial complicity based solely upon untested and unreliable declarations which had in turn been admitted upon the basis of a presumption of guilt.[12]

If the presumption may be so employed, the government's burden of persuasion on the issue of Rule 801(d)(2)(E) admissibility becomes virtually a matter of pro forma routine of automatic extrapolation from contact to complicity. Few cases indeed would fail to satisfy this de minimis burden. Indeed, the Court's stress upon the defendant's failure to demonstrate affirmatively his withdrawal in the Rule 801(d)(2)(E) context effectively shifts the burden to him to convince the trial court that the statements should *not* be admitted. Compounding the fundamental unfairness is the disparity between the respective burdens imposed by the Court's opinion in that while the Court

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[12] Where both the panel and the court en banc agreed that the April 7 events would not support the verdict, and where April 7 plus the naked toll records would be similarly insufficient, use of the presumption here transformed a case which could not even have been submitted to a jury into one which was found sufficient to support a conviction, a result which stretches Rule 801(d)(2)(E) past the constitutional breaking point.

is content to hold the government to the lesser preponderance standard, it nonetheless imposes upon the defendant a requirement of a full-fledged withdrawal defense.

This result is not only unfair but also fails to comport with the rationales of either Rule 801(d)(2)(E) or withdrawal jurisprudence. The requirement of an affirmative showing of withdrawal stems from a feeling that once one has ventured so far as to set an evil in motion, one may not escape liability unless he takes affirmative steps, either by making a "clean breast" to authorities or by communicating his total abandonment of the project to his co-conspirators. E.g., *United States* v. *Steele*, 685 F.2d 793 (3d Cir.), *cert. denied*, 459 U.S. 908 (1982). In this context, explicit affirmative action is necessary to fix the precise point of withdrawal, as the date itself has critical substantive significance, e.g., as to whether a defendant may be liable for acts subsequent to his withdrawal or whether the statute of limitations began to run. See *United States* v. *Read*, 658 F.2d 1225 (7th Cir. 1981). However, as the Third Circuit noted in *United States* v. *Trowery*, *supra* at 626:

> The distinction should be noted between "conspiracy" as a crime and the co-conspirator exception to the hearsay rule. Conspiracy as a crime comprehends more than mere joint enterprise. It also includes other elements, such as a meeting of the minds, criminal intent and, where required by statute, an overt act. When these elements are established, the crime of conspiracy is proved.
>
> The co-conspirator exception to the hearsay rule, on the other hand, is merely a rule of evidence founded, to some extent, on concepts of agency law. It may be applied in both civil and criminal cases. . . . Its rationale is the common sense appreciation that a person who has authorized another to speak or to act to some joint end will

be held responsible for what is later said or done by his agent, whether in his presence or not.

See *United States* v. *Gil*, *supra*. Thus, the theoretical underpinnings of the preponderance standard rest, at least in part, upon the understanding that to satisfy Rule 801(d)(2)(E) the government need only show a joint or agency relationship and not the outline of a full-fledged conspiracy. The burden for defendant should, accordingly, be corresponding less. The importation of a concept of substantive conspiracy law into the evidentiary rule is unwarranted and unfair.[13] Application of the presumption here violated Rule 801(d)(2)(E) and the due process clause. Because this is a frequently recurring issue with disastrous consequences if mishandled by trial courts, this Court should avail itself of this opportunity to clarify the appropriate standards for determining admissibility of co-conspirator declarations.

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[13] A withdrawal instruction was given to the jury at defendant's request. A further anomaly of the use of the presumption is presented by the fact that admissibility of Rule 801(d)(2)(E) declarations is to be determined by the trial judge either pre-trial or during trial and, in most cases, is evaluated according to the status of the evidence at the close of the government's case, a point *before* a defendant would have had an opportunity to demonstrate his withdrawal. While a judge may re-evaluate his Rule 801(d)(2)(E) findings at the close of all the evidence, the rule and the procedures which have evolved for its application clearly do not contemplate this happenstance, given the high probability of mistrial if earlier admitted statements are to be disqualified at this stage.

II. The Admission of the Co-Conspirator Declarations at Issue here Violated Gibbs' Rights Under the Confrontation Clause of the Sixth Amendment to the United States Constitution.

A. *There Is a Deep and Decisive Split Among the Circuits on the Issue of the Proper Relationship Between Rule 801(d)(2)(E) and the Sixth Amendment Confrontation Clause which Must be Resolved by This Court.*

Admission into evidence of extrajudicial co-conspirator declarations is as pervasive as it is potentially pernicious. Indeed, it is difficult to imagine a conspiracy trial[14] in which such statements do not play at least some, and often a major or even determinative role, and the reported cases amply justify this premise. This frequently recurring issue is currently shrouded by substantial confusion which has led to sharp division, both doctrinal and operational, between the circuits. This doctrinal schism has only become more firmly entrenched over the years, such that rather than a gradual progression toward a harmonious compromise, the current status has more the appearance of two armed camps, each expressly acknowledging and equally expressly rejecting the reasoning embraced by the other.

At least with respect to the "reliability" component of confrontation clause analysis mandated by *Ohio* v. *Roberts*, 448 U.S. 56 (1980), the Courts of Appeals for the First, Fourth, Fifth, and Seventh Circuits have held that satisfaction of the requirements of Rule 801(d)(2)(E) would *ipso facto* satisfy the

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[14] That such declarations may be offered in the context of the trial of any crime involving a concert of action and not merely those in which a conspiracy offense is actually charged merely compounds the magnitude of the problem.

requirements of the Confrontation Clause.[15] *See, e.g., United States* v. *Lurz*, 666 F.2d 69 (4th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982); *United States* v. *Peacock*, 654 F.2d 339 (5th Cir. 1981), *cert. denied*, 104 S.Ct. 404 (1983); *United States* v. *Papia*, 560 F.2d 827 (7th Cir. 1977); *Ottomano* v. *United States*, 468 F.2d 269 (1st Cir. 1972), *cert. denied*, 409 U.S. 1128 (1973). On the other hand, the Second, Third, Eighth, and Ninth Circuits have held that the requirements are not identical and that, assuming the declarant has been shown to be unavailable, courts must assess the circumstances of each case to determine whether the statements carry with them sufficient indicia of reliability. See, e.g., *United States* v. *Ammar*, *supra*; *United States* v. *Perez*, 658 F.2d 654 (9th Cir. 1981); *United States* v. *Wright*, 588 F.2d 31 (2d Cir. 1978), *cert. denied*, 440 U.S. 917 (1979); *United States* v. *Kelley*, 526 F.2d 615 (8th Cir. 1975), *cert. denied*, 424 U.S. 971 (1976).

This profound jurisprudential rift demands the intervention of the Court. The absence of proper confrontation at trial calls into question the ultimate integrity of the fact-finding process. *Ohio* v. *Roberts*, *supra* at 64. This Court must resolve the conflict and ensure full compliance with the mandate of *Ohio* v. *Roberts*, *supra*.

B. *The Sixth Amendment Confrontation Clause Demands that Statements Sought to be Admitted Under Rule 801(d)(2)(E) Satisfy Both the "Necessity" and "Reliability" Components of the Analysis Mandated By* Ohio *v.* Roberts.

The fundamental right of confrontation and cross-examination requires that extrajudicial declarations be subjected to a two-step analysis:

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[15] To further complicate the diversity of approach, the Fifth Circuit apparently would subject co-conspirator declarations to independent scrutiny under the *Roberts* necessity prong, but would nonetheless hold the reliability prong satisfied per se. *United States* v. *Peacock*, *supra* at 349 and n.1.

> First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. . . .
>
> The second aspect operates once a witness is shown to be unavailable. Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that "there is no material departure from the reason of the general rule."
>
> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Ohio v. *Roberts, supra* at 65, 66 (citations and footnotes omitted).

The necessity requirement is more compelling where co-conspirator declarations are involved as opposed to prior testimony because such declarations are not tested by traditional crucibles of reliability such as testimony under oath and cross-examination and even the basic question of whether or not the statements were ever made may be in issue. As such, the requirement for a showing of unavailability becomes even more critical to pres-

ervation of Sixth Amendment rights in the co-conspirator context than in either *Barber* v. *Page*, 390 U.S. 719 (1968), or *Mancusi* v. *Stubbs*, 408 U.S. 204 (1972), in both of which this Court strongly reiterated the necessity requirement in the prior testimony context.

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

Pointer v. *Texas*, 380 U.S. 400, 405 (1965).

In *Dutton* v. *Evans*, 400 U.S. 74 (1970), this Court subjected a statement admitted under a co-conspirator exception to rigorous examination under the Confrontation Clause before holding that the statement's introduction did not violate the defendant's Sixth Amendment rights. Indeed, instead of indicating that constitutional inquiry could be in any way relaxed because the hearsay was otherwise admissible under a co-conspirator exception, the Court held that the defendant's confrontation rights had not been violated only because the testimony "was of peripheral significance at most" and the possibility that the particular hearsay statement could have been proven unreliable was "wholly unreal." *Dutton* v. *Evans*, *supra* at 87, 89. As made evident by *Ohio* v. *Roberts*, *supra*, *Dutton* does not weaken the protections afforded by the necessity requirement but rather simply makes explicit an obvious corollary to the availability rule, analogous to a prosecutorial showing that further efforts to produce the declarant would have been futile, that where the government can show that cross-examination of the declarant would have been fruitless, it may be excused from producing the witness.

Given the vast potential for abuse of co-conspirator declarations, Rule 801(d)(2)(E) alone cannot define the limits of protection to be afforded criminal defendants. Rather, the rule establishes certain broad parameters which circumscribe an area statements falling outside of which are per se unduly attenuated to bear relevance to the specific conspiratorial complicity charged.[16] As such, the Rule 801(d)(2)(E) standards are not a test of reliability but rather one of nexus and necessarily, therefore, constitute only a preliminary inquiry which serves to narrow a subset of extrajudicial declarations which may or may not be admissible, subject to the same scrutiny as any other analogous category of evidence.[17]

Co-conspirator declarations are utterly devoid of the indicia of reliability upon which courts through the years have based their conclusions that certain categories of utterances or other forms of statement are inherently trustworthy, the circumstances under which they were made being such as to substantially eliminate the likelihood of fabrication.[18] Courts have frequently indulged in a fiction that the success of the conspiratorial venture depends upon an open and honest sharing of truthful and dependable information between co-conspirators. However, such disingenuousness elevates the co-conspirator to a pedestal of honesty and forthrightness seldom

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[16] The analysis of the Rule 801(d)(2)(E) factors is accordingly analogous to the balancing test mandated by Rule 404(b); where the rule is satisfied, the probative value will be found presumptively to outweigh the potential prejudice. However, the evidence is still subject to exclusion if it lacks other criteria for admissibility, e.g., is hearsay.

[17] See Fed. R. Evid. 803.

[18] Rule 801 on its face purports to do nothing more than provide definitions applicable to Article VIII of the Federal Rules of Evidence; the classification of declarations falling within Rule 801(d)(2)(E) as "nonhearsay" has no further effect than to exclude such statements from the purview of Article VIII unless otherwise expressly included. See Fed.R.Evid. 806. *Compare United States* v. *Ammar, supra* at 256, *with United States* v. *Peacock, supra* at 349.

encountered in the human condition and ignores the undeniable reality that the motives to fabricate, to prevaricate, to exaggerate, to puff, to posture, or to equivocate are as fully operational within a conspiratorial relationship as any other. See, e.g., *United States* v. *Fielding*, 645 F.2d 719, 727 (9th Cir. 1981).

The protections of Rule 801(d)(2)(E) and the Confrontation Clause are not, and cannot be, regarded as congruent. While in many, and perhaps most cases, additional Confrontation Clause analysis will not alter the admissibility determinations, the supplemental scrutiny is essential in those cases, such as Gibbs', in which the extrajudicial declarations comprise the crux of the government's case against the defendant, where the evidence *aliunde* is not sufficient to support a verdict of guilt, and where the circumstances under which the extrajudicial declarations were made is suggestive of motive to fabricate. Without such protection, the trial process becomes a mockery, a chimerical illusion which defendant is permitted to strike at, but never to hit.

C. *Under All the Circumstances of this Case, Gibbs' Fundamental Sixth Amendment Right of Confrontation was Violated.*

Neither the necessity or reliability components of the *Roberts* analysis were satisfied in Gibbs' case. None of the exceptions to the "rule of necessity" excuse the government's failure to produce or demonstrate the unavailability of Joseph Quintiliano, an indicted co-conspirator who had pled guilty prior to Gibbs' trial but who had not yet been sentenced. The declarations in question were hardly of "peripheral significance," *Dutton* v. *Evans, supra* at 87; rather they were both "crucial"

to the prosecution's case-in-chief and "devastating" to the defendant. *Id.*[19] As the *Gibbs* dissent correctly determined,

> Most important, I believe that the instant case falls outside the *Dutton* exception to the unavailability requirement because I do not believe Quintiliano's hearsay statements were only "of peripheral significance" . . . in the prosecution's case. The challenged statements provide direct incriminating evidence, in the form of Quintiliano's declaration that Gibbs had agreed to buy the marijuana. Admittedly, there is some other evidence linking Gibbs to the conspiracy. However, unlike *Dutton*, where the disputed evidence consisted of a single sentence reported by one of twenty witnesses, the co-conspirator hearsay presented in Gibbs' trial was the core of the Government's case.

See Appendix at 34a-35a (citations and footnote omitted).

The Quintiliano declarations also lack the "indicia of reliability" that were found to characterize the co-conspirator statements in *Dutton*. The most compelling indicator of such reliability involves Quintiliano's obvious motive to fabricate; what better negotiation strategy to employ with recalcitrant buyers

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[19] Indications that cross-examination is unnecessary — such as assurances that the hearsay is reliable — can never fully compensate for the advantages of actual cross-examination. The possibility always exists that confrontation will reveal error in the hearsay. Thus, the importance of the cross-examination safeguard looms larger as the hearsay's 'damaging' quality increases. Moreover, the chance that a prosecutor will yield to the temptation to manufacture or distort the hearsay also increases as the evidence becomes more important to his case. If 'crucial' and 'devastating' are to be given common sense meanings that are consistent with the plurality's usage and that focus on these concerns, then perhaps 'devastating' refers to hearsay that in itself is likely to lead the jury to believe the defendant guilty, and 'crucial' refers to hearsay that is essential to proving guilt beyond a reasonable doubt.

balking at performance of previously agreed upon terms than to indicate one's utter indifference to their position by suggesting the immediate availability of another buyer, regardless of the truth of the matter? The *Gibbs* dissent found that:

> The Government has not carried its burden of showing that Quintiliano's hearsay statements were 'marked with such trustworthiness,' *Ohio* v. *Roberts, supra,* . . . to justify disregarding the unavailability requirement. We can conceive of possible motives Quintiliano might have had to misrepresent Gibbs' involvement in the crime. For example, Quintiliano may have had a purpose in misrepresenting Gibbs' involvement in order to reassure his co-conspirators that plans for the sale of the contraband were proceeding smoothly. In addition, it is plausible that the statements were contrived as part of Quintiliano's bargaining strategy. Quintiliano may have seen a chance of pressuring the Florida buyers to offer better terms by giving Rizo the impression that he had another buyer waiting in the wings. Under these circumstances, the cross-examination of the testifying witnesses (White and Bilella) could not adequately test the truthfulness of Quintiliano's statements.

See Appendix at 34a (citation and footnote omitted). See generally Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378, 1386, 1396 (1972). Compare, e.g., *United States* v. *Ammar, supra,* where no such motives to fabricate were discerned.

Finally, the utility of cross-examination, remote in *Dutton,* is great in *Gibbs*. For example, only Quintiliano could provide testimony reconciling his toll records and his alleged state-

ments that he placed multiple calls to Gibbs and to his Florida "bosses" from his residence which do not appear on his toll records. *Most importantly,* Quintiliano could provide evidence that Gibbs had withdrawn from or been ejected from the conspiracy *before* October 5, 1980, evidence which would have rebutted the court's reliance on the presumption of continuity as the predicate for finding Gibbs to be a member of Quintiliano's conspiracy in October. Quintiliano could testify to Rizo's role and thus the significance of Quintiliano's statements in Rizo's presence as to his allegedly recontacting Gibbs — an alternative customer.[20]

Quintiliano's statements, alone, provided the evidence that supported the submission of the case to the jury. The defendant was never observed with any co-conspirator after April 7, 1980, six months prior to the marijuana importation. No witness testified to hearing any inculpatory words spoken by the defendant. Only the co-conspirator hearsay incriminated the defendant in October and provided an inculpatory color to the toll records which were bootstrapped into the corroboration which the prosecution necessarily relied on. The inescapable conclusion here is that Gibbs was convicted not based upon proof of what he did but rather upon the basis of what another said, the precise evil which the Confrontation Clause was designed to eliminate.

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[20] Quintiliano could also be examined on the implausibility of his alleged statement that Gibbs telephonically agreed to purchase marijuana and to make full payment for it without having seen its quality. Quintiliano could also be confronted on the acuity of White's memory that Quintiliano said Gibbs agreed to consider purchasing it, or to endeavor to purchase it, as such statements would constitute only a conspiracy to attempt to possess — a non-offense under 21 U.S.C. § 846. *United States* v. *Meacham,* 626 F.2d 503 (5th Cir. 1980), *cert. denied,* 459 U.S. 1040 (1982).

Conclusion.

For all the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1096

UNITED STATES OF AMERICA

v.

GIBBS, STEPHEN a/k/a "Jake,"

Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA
Crim. No. 81-00260-003

Argued September 14, 1982
Panel Opinion Filed March 22, 1983
Vacated and Rehearing En Banc
Granted May 19, 1983
Reargued En Banc November 21, 1983

BEFORE: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges* and ROSENN, *Senior Circuit Judge*

(Opinion Filed June 15, 1984)

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OPINION OF THE COURT

GARTH, *Circuit Judge*:

Defendant Stephen Gibbs was convicted after a jury trial in the United States District Court for the Eastern District of Pennsylvania of conspiracy to distribute marijuana in violation of 21 U.S.C. § 846 (1976). The conviction was based primarily on statements made by a co-conspirator, Joseph Quintiliano, that were admitted into evidence against Gibbs under Fed. R. Evid. 801(d)(2)(E), which creates a

category of non-hearsay for co-conspirators' admissions.

On appeal to a panel of this court, Gibbs argued that (1) the prerequisites for the admission into evidence of co-conspirator testimony were not satisfied, and that (2) the introduction of that evidence violated his sixth amendment right to confront and cross-examine the witnesses against him. We hold that the challenged testimony was properly admitted under Fed. R. Evid. 801(d)(2)(E) and we also hold that Gibbs' sixth amendment confrontation issue was not adequately preserved for appeal. Thus, we affirm the judgment of conviction entered below.

I.

Stephen Gibbs was one of six persons indicted for conspiracy to violate federal narcotics laws.[1] At his trial, Gibbs did not dispute that in 1980 Joseph Quintiliano and several others participated in a conspiracy to import marijuana into the United States with the intent to distribute it for sale. Rather, Gibbs' defense was that there was insufficient evidence of his own participation in the conspiracy.

The existence of the conspiracy was firmly established at trial. The evidence showed that early in

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1. Also named in the indictment were Joseph Quintiliano (an alleged co-conspirator), Jerry Quintiliano (Joseph's brother), Prentiss Breland, Michael O'Looney, and Alejandro Rizo. All six defendants were charged in Count I of the indictment with conspiracy to distribute and to possess with the intent to distribute marijuana, in violation of 21 U.S.C. § 846. All of the defendants except Gibbs were also charged with conspiracy to import marijuana unlawfully, in violation of 21 U.S.C. § 963 (Count II) and with the substantive offense of illegal importation of marijuana in violation of 21 U.S.C. § 952 (Count III). Gibbs was tried jointly with codefendant Rizo, who was convicted on two counts of the indictment. The trial of Prentiss Breland was severed, and the other three defendants pleaded guilty to the indictment.

1980, Quintiliano began to make plans to import marijuana into Pennsylvania from Colombia, South America. In late March, he purchased a Beechcraft twin-engine airplane for $40,000. According to the testimony of two unindicted co-conspirators, Charles Bilella and David White,[2] Quintiliano stated on several occasions in late March and early April that he intended to use the airplane to transport marijuana from Colombia into Pennsylvania. From April to September 1980, Quintiliano and the other conspirators made efforts to repair and equip the plane for smuggling. In late September, after several test flights, pilot Prentiss Breland[3] flew the plane from Pennsylvania to Homestead, Florida. On October 4, Breland flew the plane from Florida to Colombia. Upon his return trip to Pennsylvania in the early morning hours of October 5, Breland missed a planned refueling stop in the Bahamas and was forced to land at Boca Raton, Florida, to refuel. A few hours later Breland was arrested at the Florida airport and the plane, containing marijuana worth over $400,000, was seized.[4]

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2. Bilella was an aviation insurance broker and Quintiliano's cousin. White, an experienced pilot, was introduced to Quintiliano by Bilella. Throughout the conspiracy, White acted as an informant for the Federal Drug Enforcement Administration (DEA).

3. Prentiss Breland was convicted of violating 21 U.S.C. § 846 (conspiracy to possess with intent to distribute marijuana) and 21 U.S.C. § 963 (conspiracy to import marijuana) and he was sentenced to fifteen years imprisonment on the § 846 count and five years probation on the § 963 count. This court affirmed that judgment and conviction. United States v. Breland, No. 82-1095 (3d Cir. Sept. 14, 1982).

4. DEA Agents were notified by David White, who called from Pennsylvania to alert them that Breland had landed in Florida with drugs.

The Government prosecuted Gibbs on the theory that he participated in the conspiracy as the intended purchaser of the marijuana. The evidence linking Gibbs to the conspiracy fell into three categories. First, the Government established that on April 7, 1980, Gibbs traveled from his home in Massachusetts to Quakertown, Pennsylvania, for a meeting with Quintiliano. Gibbs flew to Philadelphia and was met there by David White, who then flew him to meet Quintiliano at Wings Airfield in Montgomery County, Pennsylvania. Surveillance officers testified that Quintiliano greeted Gibbs at Wings Airfield and drove him to the Perkins Pancake House, the site of other conspiracy meetings, where they conversed privately. Quintiliano and Gibbs then proceeded to Quakertown Airport where the Beechcraft was located, and together they inspected the airplane for several minutes. Upon leaving the airport, they were followed by Pennsylvania state troopers who observed that the people in the vehicle (Quintiliano and Gibbs) were looking around to see if someone was following them and that Quintiliano engaged in several driving maneuvers that the officers testified were designed to evade surveillance, i.e., a brief pull-off into a hotel area, followed by a resumption of travel in the same direction, and then, after further "looks" by the driver and passenger, a U-turn to proceed in the direction from which they had come.

The second category of evidence upon which the Government relied, and in fact the principal evidence offered against Gibbs, was derived from statements made by Quintiliano that implicated Gibbs in the conspiracy. Bilella and White testified that in the spring of 1980, around the time Quintiliano purchased the Beechcraft and began to repair it, Quintiliano stated that he planned to sell the marijuana to a customer named "Jake" with whom he had dealt before. On April 6, 1980, the day before Gibbs' visit to the Quakertown airport, Quintiliano told White that

"Jake" was growing impatient with the slow progress of the planning, and that Quintiliano had invited "Jake" to come for a visit the next day (*i.e.*, April 7, 1980) to see firsthand the preparations for the Colombia trip. White volunteered to meet "Jake" at the Philadelphia airport and to take him to Wings Airfield to meet with Quintiliano. White testified that the following day he went to Philadelphia and met defendant Gibbs, who identified himself as "Jake" and matched the description of "Jake" given by Quintiliano. Gibbs told White that he had been informed of the arrangements for White to meet him in Philadelphia.

Bilella also testified to an out-of-court statement by Quintiliano. According to Bilella, sometime during the first week in October, Quintiliano told him that he had made arrangements to sell the marijuana to some people from Florida who had offered more money than "Jake." (Gibbs argues that this testimony indicates that he, Gibbs, had dropped out of the conspiracy.)

White and Bilella also testified to a series of events that took place at Quintiliano's home on the evening of October 4, 1980, including statements by Quintiliano concerning telephone conversations that incriminated Gibbs in the conspiracy. Bilella testified that while he was in Quintiliano's home early that evening, he heard Rizo and Quintiliano discussing financial arrangements for the sale of the marijuana to the people from Florida, who were staying nearby. Quintiliano apparently became dissatisfied with these terms because the prospective buyers were unable to pay cash in advance. Quintiliano stated that he had telephoned "Jake" to see if he would buy the marijuana, and that "Jake" had agreed to "try to make the necessary arrangements."[5]

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5. Q: What did he [Quintiliano] say about "Jake" to you that evening?

A: He said he had called. He went to another room and

White testified that while at his own home that evening, he received a telephone call from Quintiliano asking him to come to Quintiliano's residence. When White arrived about 10:45 p.m., Quintiliano apprised him of the developments earlier in the evening. Quintiliano described to White three telephone conversations he had had with his Miami bosses, who had instructed Quintiliano not to distribute the marijuana without receiving full payment.[6] White also testified regarding Quintiliano's account of a telephone call to "Jake" in which "Jake" reportedly had agreed to buy the marijuana but needed time to obtain the necessary funds.[7] These conversations between White

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said he had called up "Jake" and asked him if he could perhaps make arrangements to have someone come down and pick up this load.

Q: Did he tell you whether he had reached "Jake" to speak to him?

A: He had spoken to him, yes.

Q: And did he tell you what "Jake's" response to him was?

A: That he would try to make the necessary arrangements, yes.

App. 273a (Briella on Direct Examination).

6. The telephone records show that Quintiliano made one call to Florida at 10:52 p.m.

7. Q: Were other telephone calls made that evening?

A: Joe made a call to a -- gentleman named "Jake" in -- in the Boston or Massachusetts area to see if he would buy the -- marijuana.

Q: And after that telephone call, what did Joe say about the call?

A: Joe told me that "Jake" would buy the marijuana. He only could -- could that night -- he only had a hundred thousand dollars cash on hand. We -- he would be able to get the rest of the money in a day or when the banks opened.

App. 109a (White on Direct Examination).

and Quintiliano took place in Rizo's presence. White further testified that he heard Quintiliano instruct his brother Jerry to call "Jake" from a pay phone. Quintiliano asked White for permission to store the marijuana temporarily in his shop until "Jake" could get the money, and at about 12:30 a.m. on October 5, 1980, White, Quintiliano, and other conspirators met at White's shop to clear storage space for the marijuana.

The third category of evidence by which the Government sought to link Gibbs to the conspiracy and to corroborate the co-conspirator testimony consisted of telephone records showing long distance calls made from the Quintiliano residence in Pennsylvania. At least six telephone calls were made from Quintiliano's residence to the Gibbs residence in Massachusetts between March and May 1980.[8] Four such calls were made during September 1980, three of which occurred on September 26-27, about the time Breland flew the plane to Florida. Another call was made on October 3, 1980, the day before the plane left for Colombia. In addition, two calls were made from the Quintiliano residence to the Gibbs residence in the early morning hours of October 5, at the time the plane was due in Quakertown. The second such call, made at 3:39 a.m., followed a call from Quintiliano to David White, who was waiting at Quakertown Airport, in which Quintiliano told White that something had gone wrong with Breland's flight home.

There also was evidence of telephone calls on October 4, 1980, from Quintiliano's residence to the Ram Broadcast Co. (Ram), an electronic beeper service

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8. The evidence documents five calls in March and one in May 1980. The Government offered no records for the month of April.

located near Gibbs' home in Massachusetts.[9] Although there was no direct evidence that the defendant was a client of Ram, the Government did demonstrate that one of Ram's customers was a "Gibbs Oil Co." and that Gibbs himself had claimed to be involved in the oil business. There was no evidence that these calls to Ram were returned.

On appeal, Gibbs contends that the district court erred in allowing the jury to consider the statements made by Quintiliano to White and Bilella as evidence against Gibbs. He maintains that Quintiliano's out-of-court statements were hearsay declarations that should have been excluded from admission under the Federal Rules of Evidence and under the Confrontation Clause of the sixth amendment to the Constitution.

II.

Under the Federal Rules of Evidence, the out-of-court statements of a party to the case or of his agent are considered "admissions" -- non-hearsay[10] -- and may be used as substantive evidence. *See* Fed. R. Evid. 801(d)(2). Rule 801(d)(2)(e) provides that statements offered against a party that are made "by a co-conspirator of a party during the course and in furtherance of the conspiracy" are not hearsay and are admissible. In this case, the district court found that

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9. The first such telephone call was made early in the morning of October 4. A call was also made that night at 8:52 p.m., and at 10:21 p.m., a call to Ram was placed from a pay telephone near Quintiliano's home and charged to the Quintiliano residence.

10. Technically, the federal rules exclude admissions from the definition of hearsay rather than treating them as exceptions to the rule against hearsay. *See* United States v. Ammar, 714 F.2d 238, 255 (3d Cir.), *cert. denied*, 104 S. Ct. 344 (1983). For simplicity, we will refer to the "co-conspirator exception."

Quintiliano's out-of-court statements were admissible against Gibbs as co-conspirator admissions.

Before an out-of-court statement can be admitted into evidence under Fed. R. Evid. 801(d)(2)(E), three requirements must be satisfied. *United States v. Ammar*, 714 F.2d 238, 245 (3d cir.), *cert. denied*, 104 S. Ct. 344 (1983). First, there must be independent evidence establishing that the person against whom the statement is offered participated in the conspiracy. Second, the statement must have been in furtherance of the conspiracy. Third, the co-conspirator's statement must have been made during the life of the conspiracy. Gibbs contends that the first and second prerequisites are not met in this case.

A. *Independent Evidence of Conspiracy*

According to the rule of *United States v. Trotter*, 529 F.2d 806 (3d Cir. 1976), the prosecution must lay a foundation for the admission of co-conspirator testimony by establishing the existence of a conspiracy including the defendant by "a fair preponderance of independent evidence." *Id.* at 811-13. *See Ammar*, 714 F.2d at 246 & n.3.; *Government of the Virgin Islands v. Dowling*, 633 F.2d 660, 665 (3d Cir.), *cert. denied*, 449 U.S. 960 (1980); *United States v. Continental Group, Inc.*, 603 F.2d 444, 457 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980).[11] This preponderance standard

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11. Other courts have also adopted this rule. *See, e.g.*, United States v. Andrews, 585 F.2d 961 (10th Cir. 1978); United States v. Santiago, 582 F.2d 1128 (7th Cir. 1978); United States v. Enright, 579 F.2d 980 (6th Cir. 1978); United States v. Bell, 573 F.2d 1040 (8th Cir. 1978); United States v. Stanchick, 550 F.2d 1294 (2d Cir. 1977); United States v. Jones, 542 F.2d 186 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976). *But see* United States v. Bulman, 667 F.2d 1374, 1377-79 (11th Cir.), *cert. denied*, 456 U.S. 1010 (1982) (adopting Fifth Circuit precedent of "substantial independent evidence" test); United States v. Slade, 627 F.2d 293, 307 (D.C. Cir. 1980) (same test); United States v. James, 590 F.2d 575 (5th Cir.) (en banc) (same test), *cert. denied*, 442 U.S. 917 (1979).

simply requires the prosecution to present sufficient proof so that the trial judge may find "that the existence of the contested fact is more probable than its nonexistence." *Trotter, supra*, 529 F.2d at 812 n.8 (quoting McCormick, *Evidence* 794 (2d ed. 1972)).[12] In reviewing the district court's determination that a preponderance of independent evidence established Gibbs' participation in the conspiracy, this court's inquiry is limited to whether the trial judge had "reasonable grounds" to make his finding. *Ammar*, 714 F.2d at 249; *Continental Group*, 603 F.2d at 460; *United States v. Bey*, 437 F.2d 188, 196 (3d Cir. 1971).

In holding that the district court did not err in finding that the conspiracy existed and that Gibbs participated in the conspiracy we do not consider the alleged telephone conversations between Quintiliano and Gibbs to which White and Bilella testified.[13] The existence of a conspiracy in this case is clear and uncontested. As for Gibbs' participation in the conspiracy, the independent evidence (*i.e.*, evidence apart from the testimony of White and Bilella) offered by the Government to prove that Gibbs was a member of the conspiracy, while not weighty, was nevertheless sufficient. The Government relied heavily on Gibbs' visit to Pennsylvania in April 1980 and on telephone records showing calls made from Quintiliano's residence to Gibbs' residence or Ram Broadcast Co. around the time of the unsuccessful smuggling operation.

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12. In *Trotter*, this court refused to accept the Government's suggestion that a less rigorous standard requiring only "prima facie proof" was appropriate in light of United States v. Nixon, 418 U.S. 683 (1974)

13. Once Gibbbs was held to have participated in the conspiracy the telephone conversations referred to in text were properly admissible against Gibbs under Fed. R. Evid. 801(d)(2)(E). *See Ammar*, 714 F.2d at 245.

The circumstances surrounding Gibbs' April 7, 1980, visit to see Quintiliano, the principal conspirator, provides some evidence that Gibbs was involved in Quintiliano's scheme at that time. The meeting took place only nine days after Quintiliano bought an airplane to be used for smuggling marijuana into the United States, and it took Gibbs a considerable distance from home to the place of the conspiratorial planning. Gibbs and Quintiliano had obviously had some communication prior to the visit. Although the plane was located at Quakertown Airport, White was instructed by Quintiliano to take Gibbs to Wings Airfield,[14] from which the Government suggests an inference can be drawn that Gibbs and Quintiliano wanted to hide their connection with the smuggling plane located at Quakertown Airport.[15] Gibbs and Quintiliano conferred at the Perkins Pancake House, the site of previous conversations between Quintiliano and White and Bilella concerning the conspiracy. The defendant and Quintiliano then proceeded to Quakertown Airport, where they inspected the plane to be used in the smuggling operation. Finally, evidence of Quintiliano's evasive driving after leaving

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14. White testified on direct examination that he "volunteered to go down and pick up 'Jake' with my -- with an airplane, and Joe accepted the -- the offer, . . . and the next day I went down to the airport and met -- met 'Jake'." App. 61a. This testimony would be admissible against Gibbs to link him to the conspiracy without running afoul of the hearsay rules.

15. The defendant argued before this court, based on the record, that Gibbs was taken to Wings Airfield because it was convenient to Quintiliano's residence. Accepting that as true does not alter the fact that a reasonable inference such as the Government suggests could be drawn from the circumstances described. At this point in time, the Government is entitled to the benefit of any reasonable inferences that may be drawn from the record. Glasser v. United States, 315 U.S. 60, 80 (1941).

Quakertown Airport accompanied by his passenger Gibbs, and the frequent glances by both Quintiliano and Gibbs for the apparent purpose of detecting surveillance allows the further inference of unlawful activity. *See United States v. D'Amato*, 493 F.2d 359, 364-65 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974) (counter-surveillance driving indicative of conspiracy).

We recognize that at that point in the trial the evidence of Gibbs' contacts with Quintiliano may have fallen short of establishing Gibbs' involvement in the conspiracy beyond a reasonable doubt. But that is not the appropriate standard to be applied at that stage. The evidence, as recounted above, permits a reasonable inference of Gibbs' complicity in the enterprise then under way. We cannot say that the district court lacked reasonable grounds to infer that Gibbs was participating in the conspiracy at the time of his visit.[16]

Because most of the co-conspirator declarations offered by the Government were made six months after Gibbs' April 7, 1980, visit to Pennsylvania, we must consider whether there was sufficient independent evidence from which the district court reasonably could have inferred that Gibbs was still involved in the conspiracy in October 1980. The Government, in seeking to demonstrate the necessary predicate for admission of Quintiliano's co-conspirator declarations,

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16. It is true that mere association with those who have conspired cannot by itself support a conviction for conspiracy. *See Ammar*, 714 F.2d at 250; United States v. Torres, 519 F.2d 723, 726 (2d Cir.), *cert. denied*, 423 U.S. 1019 (1975). In the instant case, however, inferences are capable of being drawn which suggest that Gibbs' meeting with Quintiliano was "intended to advance the ends of the conspiracy." *See* United States v. Mancillas, 580 F.2d 1301, 1308 (7th Cir.), *cert. denied*, 439 U.S. 958 (1978). In addition, it must be remembered that the Government's burden here was only to establish the existence of a conspiracy by a preponderance of the evidence.

relied on a presumption that Gibbs' membership in the conspiracy continued until October 1980.[17]

This court has held that once the Government establishes a defendant's involvement in an ongoing conspiracy, the burden shifts to the defendant to prove by affirmative acts inconsistent with the object of the conspiracy that he withdrew.[18] *Ammar*, 714 F.2d at 254; *United States v. Steele*, 685 F.2d 793, 803-04 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 213 (1983); *United States v. Gillen*, 599 F.2d 541, 548 (3d Cir.), *cert. denied*, 444 U.S. 866 (1979).[19] Because there is no

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17. Direct evidence of Gibbs' relationship to Quintiliano in October 1980 consists of telephone records showing calls from the Quintiliano residence to the Gibbs residence or to Ram Broadcast Co. at around that time. The Government suggests that from this series of telephone calls it can be inferred that Gibbs and Quintiliano were discussing arrangements for the sale of the marijuana in furtherance of whatever plans they had made at their April meeting. Gibbs argues otherwise. He claims that one obvious difficulty is the absence of evidence directly linking Gibbs with Ram or showing that any of Quintiliano's calls were returned. Moreover, Gibbs asserts that except for Quintiliano's hearsay, there is nothing to indicate the substance of the conversations, and the bare bone telephone toll records have little probative value.

18. Defendants can also show "that the conspiracy terminated, such as by demonstrating that its ends had been so frustrated or its means so impaired that its continuation was no longer plausible." *Ammar*, 714 F.2d at 254. There is no doubt in this case but that the drug smuggling conspiracy itself had not been terminated and was ongoing in October 1980.

19. Gibbs claims the presumption of continuing involvement under *Gillen* is unconstitutional, citing United States v. Read, 658 F.2d 1225 (7th Cir. 1981). *Read*, however, concerns the prosecution's burden to prove every element of the offense beyond a reasonable doubt as a basis for a conviction and thus is not relevant to the lesser showing that must be made to permit the introduction of co-conspirator statements. Moreover, *Read* did impose on the defendant the burden of presenting *some* evidence of withdrawal. *Id.* at 1239. Here none was presented.

evidence that Gibbs withdrew from the conspiracy after April, his involvement may be deemed to have continued until October,[20] making him a conspirator at the time of Quintiliano's incriminating statements to White and Bilella on October 4 and 5, 1980. Therefore, we conclude that the district court did not err in its determination that the Government met its burden of establishing by a preponderance of independent evidence that Gibbs was involved in the conspiracy at the time of Quintiliano's statements.

B. "*In Furtherance*" of the Conspiracy

Gibbs argues that the Government did not satisfy the requirement of Fed. R. Evid. 801(d)(2)(E) that the statements be made *in furtherance* of the conspiracy. Gibbs claims that Quintiliano's statements to White and Bilella were mere "narratives of past fact" and not made to induce conduct that would further the goals of the conspiracy, and that White and Bilella were mere "errand runners."

Gibbs' argument is meritless. The "in furtherance" requirement is usually given a broad interpretation. *See United States v. Trotter, supra*, 529 F.2d at 813. It is true that statements made to those who are not involved in the conspiracy are not "in furtherance" of it, *United States v. Provenzano*, 620 F.2d 985, 1000-01 (3d Cir.), *cert. denied*, 449 U.S. 899 (1980),

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20. Although Gibbs challenged the admissibility of Quintiliano's out-of-court statements and at the conclusion of the trial moved "to strike all of the hearsay coconspirator's declarations," on appeal Gibbs argues in support of his claim (that he had withdrawn from the conspiracy) that an alleged statement by Quintiliano to Bilella early in October 1980 -- to the effect that Quintiliano had another potential buyer from Florida for the marijuana -- is evidence that Gibbs had withdrawn from the conspiracy as early as April. This testimony, however, is a portion of the very evidence to which Gibbs objects.

just as casual conversation between co-conspirators that is not intended to induce continued involvement, or other actions that would not advance the conspiracy, are not "in furtherance" of a conspiracy. *See, e.g., United States v. Lieberman*, 637 F.2d 95, 103 (2d Cir. 1980); *United States v. Eubanks*, 591 F.2d 513, 520-21 (9th Cir. 1979). But statements made by one conspirator to keep other conspirators informed about the progress of the scheme do satisfy the "in furtherance" requirement. *See, e.g., Ammar*, 714 F.2d at 252; *United States v. Pool*, 660 F.2d 547, 562 (5th Cir. 1981); *United States v. Mason*, 658 F.2d 1263, 1270 (9th Cir. 1981).

In the present case, there was a reasonable basis for the trial court to find that Quintiliano's statements to Bilella and White were made in furtherance of the conspiracy. As participants in the scheme, it was important for White and Bilella to be kept abreast of developments to induce their continued participation and allay any fear they might have had. Although neither White nor Bilella had any decision-making role or any real interest in the identity of the buyer, they both had been closely involved in the planning and implementation of the conspiracy. White had picked up Gibbs at the Philadelphia Airport and brought him to the conference rendezvous with Quintiliano in April, and had also agreed to help unload the marijuana when the plane arrived. Quintiliano, who specifically had asked White to come to his home for a talk, may have foreseen that he would be requesting White's cooperation in storing the marijuana temporarily. Although Bilella at that time had no specific duties with respect to the conspiracy, he had repeatedly rendered assistance to Quintiliano; he had at Quintiliano's request found the Beechcraft plane for purchase and had introduced him to White, an experienced pilot. Quintiliano also may have felt that

he would need Bilella's help in the future. Under these circumstances, Quintiliano's reports to White and Bilella did further the conspiratorial scheme.

This case is distinguishable from *United States v. Provenzano*, *supra*, where the co-conspirator's statements were held not to be in furtherance of the conspiracy. Contrary to the circumstances of the instant case where all the statements were made to co-conspirators, in *Provenzano*, the statements were made to persons *not* part of the conspiracy who had no reason to know about the matters disclosed to them.

We conclude that the Government satisfied its burden of laying the necessary foundation for admission of Quintiliano's co-conspirator statements against Gibbs under Fed. R. Evid. 801(d)(2)(E). It remains for us to consider Gibbs' contention that his constitutional rights under the sixth amendment Confrontation Clause were violated.

III.

The sixth amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Gibbs contends on appeal that the admission of out-of-court statements made by Quintiliano on October 4 and 5, 1980, had the effect of denying Gibbs his constitutional right to confront and cross-examine his accuser. Gibbs argues that under the rule of *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980), which examined the bounds of the sixth amendment, the Government was required to prove that the declarant, Quintiliano, was unavailable, and that the co-conspirator evidence was reliable,[21] before any such testimony could be

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21. The only argument made by Gibbs challenging the reliability of the evidence is that Quintiliano had reason to, and did, fabricate Gibbs' involvement in the conspiracy. In Ohio v. Roberts,

admitted into evidence. We recognize that no exact equation exists between Fed. R. Evid. 801 and the Confrontation Clause, *see Dutton v. Evans*, 400 U.S. 74, 86 (1970); *Ammar*, 714 F.2d at 254-55, thereby raising the possibility that evidence that satisfies Fed. R. Evid. 801(d)(2)(E) could still be deemed inadmissible under the constitutional test. Gibbs has argued that unavailability must be demonstrated and that the Government has the burden of establishing unavailability. However, we have no occasion to discuss or to reach the merits of that issue in this case, *i.e.*, whether unavailability must be shown to satisfy the Confrontation Clause where a co-conspirator statement is sought to be admitted. Even if we were to assume that unavailability had to be demonstrated, Gibbs did not preserve that question for appeal.

The Confrontation Clause issue now raised by Gibbs -- *i.e.*, that the Government did not carry its burden of proof as to unavailability and reliability of

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448 U.S. 56 (1980), the Supreme Court held that "the Confrontation Clause restricts the range of admissible hearsay by imposing a two-prong requirement: first, the government must normally show that the declarant is unavailable and that the hearsay testimony is thus necessary; and second, the statement must bear sufficient 'indicia of reliability' to demonstrate its trustworthiness." United States v. Ammar, 714 F.2d 238, 255 (3d Cir.), *cert. denied*, 104 S. Ct. 344 (1983), citing *Roberts*, 448 U.S. at 65-66. Some members of the majority believe that the reliability component of the *Roberts* test should be addressed in this opinion, while others do not. *See* United States v. Ammar, 714 F.2d 238, 254-57 (3d Cir. 1983) (decided after Gibbs' trial). Regardless of that philosophical disagreement, all the members of the majority are in agreement that the *Roberts* reliability requirement, if preserved for appeal, was satisfied in this case. *See Ammar*, 714 F.2d at 256 ("[I]n many, if not most, instances a coconspirator statement which is admissible under Rule 801(d)(2)(E) will also be sufficiently reliable to satisfy the Confrontation Clause."). In short, we are not persuaded by Gibbs' reliability argument.

the evidence (*see* note 21 *supra*) -- was never raised by Gibbs during trial. Had Gibbs, by a specific objection, timely made, alerted the Government and the district court to the fact that no proof of unavailability had been presented by the Government, that deficiency could have been cured. But because Gibbs did not preserve that issue for appeal, it cannot serve now as a basis to reverse Gibbs' conviction.

A.

The evidence against Gibbs, the ostensible purchaser in a conspiracy to import and distribute a large quantity of marijuana, consisted in significant part of the testimony of Bilella and White, two unindicted co-conspirators, who testified to a number of hearsay declarations by Quintiliano (the alleged chief conspirator, who did not testify at trial) to the effect that Quintiliano planned to sell the marijuana to a customer named "Jake" (Gibbs).

At no time during the Government's case-in-chief, however, did Gibbs object to any of Quintiliano's hearsay declarations on Confrontation Clause grounds. Rather, Gibbs' counsel asserted that under the co-conspirator rule, Fed. R. Evid. 801(d)(2)(E), Quintiliano's out-of-court declarations were inadmissible because the Government had not established, by independent evidence, either the existence of a conspiracy or Gibbs' involvement in the conspiracy. During White's testimony, for example, the following exchange transpired:

> Q. Mr. White, did Joseph Quintiliano ever mention to you potential buyers for the marijuana?
>
> MR. BERGSTROM: Objection.
>
> It is hearsay, Your Honor, and there is no proof aliunde of a conspiracy at this point in the case.

THE COURT: Well, that we do not find persuasive.

We will permit the question.

App. at 43a. Counsel later obtained a standing objection to White's repetition of Quintilliano's out-of-court declarations. *Id.* at 55a.

Similarly, during Bilella's testimony the following exchange took place:

Q. Now, you mentioned someone by the name of "Jake."

Who was it that told you about "Jake"?

A. Well, Joe had mentioned a fellow named --

MR. BERGSTROM: Objection -- it is hearsay, Your Honor, for the record, sir.

THE COURT: Your response, Mr. Huyett.

MR. HUYETT: Yes, sir.

It is a co-conspirator statement.

THE COURT: Yes.

The witness may [answer] the question if he understands it.

App. 248a.

At this juncture, Gibbs did not question, and consequently the Government had no obligation to answer, whether the introduction of Quintilliano's declarations would violate the Confrontation Clause -- much less that the Confrontation Clause would require a showing of unavailability. Thus, it is not surprising that the question of who bore the burden of establishing Quintilliano's unavailability, and the concomitant factual question as to whether Quintilliano was unavailable never arose. Certainly

Gibbs never raised any such issue. And because Rule 801[22] -- unlike Fed. R. Evid. 804[23] -- does not require a showing of unavailability, the subject of Quintiliano's availability never became an issue, and thus never became part of the record.

On November 27, 1981, the Government rested. App. 442a. Gibbs then moved, pursuant to Fed. R. Crim. P. 29(a), for a judgment of acquittal. At the same time, counsel for Gibbs stated that "it would probably be necessary for me also to make a motion to the Court to . . . strike all of the hearsay co-conspirator declarations from the record." App. 448a. Gibbs renewed at this stage the argument, raised in his Memorandum of Law and by his trial objections referring to Fed. R. Evid. 801, that the Government failed to establish "a conspiracy by a clear preponderance of the evidence independent of the co-conspirator statement and the participation of the defendant, Gibbs, in that conspiracy . . . . " *Id.*

In addition, for the first time Gibbs observed "yet another problem." App. 452a. "Aside from [Rule] 801(d)(2)(E)," Gibbs argued, "there is a clear Sixth Amendment problem in this case." *Id.* Noting that the co-conspirator hearsay rule "does not subsume and take the place of the Sixth Amendment right to confrontation," Gibbs asserted that the "Sixth Amendment right and Rule 801(d)(2) are going to come

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22. Rule 801(d)(2)(E) states only that "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

23. Rule 804(b) lists five hearsay exceptions which "are not excluded by the hearsay rule if the declarant is unavailable as a witness," using the definition of "unavailable" found in Rule 804(a) (listing five categories of when a witness is to be deemed unavailable).

smashing head on into one another . . . in this case." *Id.* at 452a-53a. The essence of Gibbs' sixth amendment objection is captured by the following passage:

> The [men] who should have been on that witness stand and whom I should have been able to cross-examine [were] Joe Quintiliano [and his brother] Jerry Quintiliano, the declarant[s] of the hearsay statement[s], and I have been denied through this case the right to confront and cross-examin[e] [those] who really are the ultimate accusers in this case . . . -- that being Joseph and Jerry Quintiliano.

App. 453a.

At no time during these remarks, however, did Gibbs assert that Quintiliano was in fact available, or that the Government had the burden of showing unavailability and had not carried this burden. As a consequence, neither the Government nor the district court was alerted to the nature of the issue upon which Gibbs now seeks to have his conviction reversed.

Had anyone mentioned the word "availability," of course, it would have been a relatively simple matter for the Government to address that question and produce proofs as to Quintiliano's availability or unavailability. Presumably the Government could have called Quintiliano, and if Quintiliano had asserted the fifth amendment privilege against self-incrimination, he then would have been deemed unavailable. *See United States v. Pelton*, 578 F.2d 701, 709-10 (8th Cir. 1978). Hence, it is solely by reason of Gibbs' failure to raise the issue of Quintiliano's availability before the district court, that the record is barren of any evidence of Quintiliano's unavailability.

The district court denied Gibbs' motion to strike and motion for judgment of acquittal without comment on Gibbs' general constitutional objection. The court

found only that "the Government has established the existence of an alleged conspiracy and the connection of each defendant with it by a clear preponderance of the evidence independent of the hearsay declarations." App. at 480a. The defense rested immediately thereafter. Gibbs' conviction followed.

B.

There are compelling reasons why Gibbs' Confrontation Clause objection -- even if it had been specifically made, and even if it had addressed the issues of burden of proof and unavailability, which it did not -- should be regarded as untimely.

First, Fed. R. Evid. 103(a)(1) requires that a timely objection or motion to strike must "stat[e] the specific ground of objection, if the specific ground was not apparent from the context." Gibbs can hardly argue that the issue of the Government's failure to establish Quintiliano's unavailability -- an argument that eluded the Government and the district court -- was "apparent from the context." It follows that Gibbs was obliged to satisfy the specificity requirement of Rule 103.

The Advisory Committee Notes to Rule 103 indicate that the purpose of the specificity requirement is to call the nature of the error "to the attention of the judge, so as to alert him to the proper course of action and enable opposing counsel to take proper corrective measures." Rule 103(a) Advisory Comm. Note. Gibbs' objection is the model of an objection that fails the Advisory Committee's test. At no time was the district court ever apprised that the nub of Gibbs' complaint was that the Government had not proved Quintiliano's unavailability. As a consequence, the Government was deprived of the opportunity to take corrective measures -- including the possibility of calling Quintiliano in order to establish that he would assert the fifth amendment privilege.

Second, even assuming that Gibbs' objection was

sufficiently specific. Gibbs made his constitutional objection *not* when the evidence was offered, but during a motion to strike made *after* the Government rested. As a consequence, the many co-conspirator declarations related by White and Bilella over the course of a three-day trial were already in evidence.

As Professors Wright and Graham note, the appropriate time for raising an objection is as soon as the ground for objection is known, or could reasonably have been known to the objector -- unless some special reason makes its postponement desirable and not unfair to the opposition. 21 C. Wright & K. Graham, Federal Practice and Procedure § 5037, at 188 (1977). Nothing prevented Gibbs' counsel from raising an objection when White first testified. Gibbs could have objected to the following effect: "Your Honor, although Rule 801 does not require that the declarant be unavailable, the Confrontation Clause does. Because there is no evidence that Quintiliano is unavailable, the evidence is inadmissible."

This simple objection, if made when the Government sought to introduce the testimony of White and Bilella, would have warned the Government of the need to call Quintiliano, or to prove his unavailability in other ways. No special reasons made a postponement of this objection desirable, and a good many reasons made its postponement unfair. Not the least of these reasons is that the Government would have been obliged to reopen its case in order to establish Quintiliano's unavailability -- a matter which, from his silence at trial, we can only assume Gibbs had taken for granted.

If Quintiliano ultimately proved to be unavailable, a delay of several days might have resulted until the Government produced him -- a delay that could have been obviated had Gibbs' constitutional objection been made during the trial, when it would have been timely.

rather than after the evidence had closed. Even at that late date, an issue raised as to unavailability could still have been met by the Government. If, however, Quintiliano had proved to be "available" -- perhaps because he would choose not to assert his fifth amendment privilege -- Gibbs' motion to strike, if granted, would almost certainly have been followed by a motion for mistrial on the ground that no jurors could be expected to expunge from their minds the many hearsay declarations adduced throughout three days of prior testimony.

This court has frequently held that it will not entertain arguments on appeal based on objections not timely raised below. *See Halderman v. Pennhurst State School & Hospital*, 673 F.2d 628, 639 (3d Cir. 1982) (in banc), *reversed on other grounds*, 104 S.Ct. 900 (1984); *Caisson Corp. v. Ingersoll-Rand Co.*, 622 F.2d 672, 680 (3d Cir. 1980). To do so here would constitute an unacceptable interference with the administration of justice and the district court's management of the trial. We reverse the trial judge's determination of timeliness only for an abuse of discretion.[24] The circumstances here do not rise to that

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24. In Belmont Industries, Inc. v. Bethlehem Steel Corp., 512 F.2d 434 (3d Cir. 1975), testimony had been received without objection "at widely scattered times over [a] ten-day trial." *Id.* at 437. Belmont moved after the close of Bethlehem's case to strike considerable portions of testimony on hearsay and best-evidence grounds. In addition, like Gibbs, Belmont's motion did not specify which of the items of testimony were to be stricken. *Id.* This court held:

> We cannot say that the trial judge abused his discretion in determining that the possibilities of confusion to the jury, prejudice to the opposing party, and undue delay of a case about to be submitted to the jury outweighed the detriment suffered by Belmont resulting from the reception of this allegedly hearsay and secondary evidence.

level. For these reasons, we hold Gibbs' objection untimely[25] and insufficient to preserve a Confrontation Clause "unavailability" issue for appeal.

V.

As we have discussed, we are satisfied that there was sufficient evidence to withstand Gibbs' 801(d)(2)(E) objection, which had been properly taken. Gibbs, however, did not preserve in timely fashion the Confrontation Clause issue which he has raised on appeal. His failure to alert the Government or the court to the issue of Quintiliano's unavailability precludes our consideration of Gibbs' argument which involves, among other things, the Government's failure to carry its sixth amendment burden of proof. Having failed to preserve this issue at the threshold, there is no need for us to address the merits of his sixth amendment argument.

We will affirm Gibbs' conviction.

ROSENN, *Circuit Judge*, with whom Aldisert and Gibbons, Circuit Judges, join, dissenting.

Beginning with the defendant's brief and only appearance in Quakertown, Pennsylvania, the

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Id. (footnote omitted).

The circumstances in *Belmont Industries* apply with equal force here. Certainly the prospects of confusion to the jury, prejudice to the Government, and undue delay are very real in this case, particularly since here Gibbs at no time made known the specific constitutional ground on which he now relies.

25. Although we may entertain on appeal objections not timely raised below if the district court committed plain error, *see* Fed. R. Crim. Proc. 52(b); *Halderman*, *supra*, 673 F.2d at 639-40, we are satisfied that in this instance the district court did not commit plain error.

Government's case against him is built upon speculative inferences, legal fiction, and double hearsay. These are joined by the fragile tissue of a judicial presumption that, once a defendant has been found to have participated in a conspiracy, he is presumed to continue to participate in it despite the lapse of considerable time, unless he produces affirmative evidence that he has withdrawn.

The Government's case is grounded on meager testimony -- barely sufficient under the preponderance of evidence rule of this circuit -- offered as independent evidence of defendant's participation in the marijuana conspiracy[1] as a potential buyer. On the basis of this slight, inferential, and dubious evidence the Government introduced the out-of-court hearsay declarations. To accomplish this objective the Goverment leaned heavily on the coconspirator rule, which is based on the legal fiction that each conspirator is the agent of the other. It has neither produced the declarant for cross-examination nor has it shown that he is unavailable. Also absent is not only direct or circumstantial evidence of guilt, but the

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1. Judge Aldisert and Judge Gibbons believe that there was insufficient evidence of conspiracy measured by the "fair preponderance of independent evidence" test of United States v. Trotter, 529 F.2d 806, 811-12 (3d Cir. 1976). *See also* Edward J. Sweeney & Sons, Inc. v. Texaco, 637 F.2d 105, 115-17 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

Several other circuits have adopted a more stringent test than the preponderance of evidence rule for the admission of coconspirator statements. They require "substantial evidence," independent of the statements, showing the defendant's participation in the conspiracy. United States v. Bulmon, 667 F.2d 1374, 1379 (11th Cir.), *cert. denied*, 456 U.S. 1010 (1982); United States v. Jackson, 627 F.2d 1198, 1219 (D.C. Cir. 1980); United States v. Grassi, 616 F.2d 1295, 1300-01 (5th Cir. 1980); United States v. Petersen, 611 F.2d 1313, 1330-31 (10th Cir. 1979).

procedural opportunity for fairness and the discovery of truth. The accused has been denied the fundamental right to cross-examine the out-of-court declarant. A society that values the good name and liberty of every person should not condemn anyone on such a naked amalgam of double hearsay, legal fiction, and judicial presumption. I therefore dissent.

I.

No one disputes the existence of the 1980 conspiracy among the two Quintiliano brothers and others to smuggle marijuana into Pennsylvania from Colombia, South America, and to distribute it. As the majority correctly observes, typescript op. at 5, the Government prosecuted Gibbs on the theory that he too participated in the conspiracy as the potential purchaser. To prove his participation, the Government established that on April 7, 1980, Gibbs flew to Wings Air Field in Montgomery County, Pennsylvania, where Joseph Quintiliano[2] met him. They then traveled to the Quakertown Airport, where they inspected for several minutes the Beechcraft airplane purchased several weeks previously by Quintiliano to smuggle the marijuana from Colombia.

At this point, there may have been several legitimate reasons why Gibbs was in Quakertown. State police officers, however, gave it a criminal conspiratorial flavor by testifying that they observed Quintiliano, upon leaving the Quakertown Airport, engage in what they considered evasive driving to avoid surveillance.

Based upon this tenuous evidence of Gibbs's complicity in the conspiracy, the Government introduced out-of-court statements allegedly made by

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2. All references hereinafter to Quintiliano are to Joseph Quintiliano.

Quintiliano to Bilella and White, unindicted coconspirators, of what Gibbs allegedly told Quintiliano.[3] These out-of-court statements, which the majority acknowledges were the principal evidence offered against Gibbs, typescript op. at 5, became the fulcrum of the Government's case and were essential to convict Gibbs. The Government never called Quintiliano, but instead produced Bilella and White, who testified that about the time Quintiliano purchased the Beechcraft airplane he told them that he planned to sell the imported marijuana to a customer named "Jake." White testified that Gibbs, whom he had met when Gibbs came to inspect the plane at Quakertown, matched Quintiliano's description of "Jake" and had identified himself to White under that name.

The crux of the Government's case depends upon the out-of-court statements made on the evening of October 4, 1980, at Quintiliano's home. These statements allegedly (typescript op. at 6-8) made by Gibbs alluded to Quintiliano's reopening of negotiations with him in early October 1980 after Quintiliano had rejected some Florida prospects for the purchase. They were introduced in evidence through Bilella's and White's testimony. Quintiliano told them that he had telephoned "Jake" when he rejected the prospective Florida purchasers and that "Jake" told him that he would "try to make the necessary arrangements" for the purchase.

In an effort to give some credence to the hearsay testimony, the Government introduced evidence of certain telephone records. They showed that long distance calls were made early in October 1980 from

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3. This constituted the "double hearsay" referred to in this dissent -- Gibbs to Quintiliano and Quintiliano to Bilella and White.

Quintiliano's residence in Pennsylvania to the Gibbs residence or to the Ram Broadcast Company in Massachusetts. There is no evidence, however, of any conversation with Gibbs. The Government suggests that from this series of telephone calls it can be inferred that Gibbs and Quintiliano were discussing arrangements for the sale of the marijuana in furtherance of whatever plans they had made at their April meeting. There are several major problems with the Government's argument, however. One obvious difficulty is the absence of evidence directly linking Gibbs with Ram or proof that any of Quintiliano's calls to Ram were returned. Moreover, except for Quintiliano's out-of-court hearsay, there is nothing to indicate the substance of the conversations or that they actually conversed. The mere toll charge records have little probative value and they do not support the majority's assertion that the hearsay statements "concern conversations between Gibbs and Quintiliano." Typescript op. at 10, n.9.

II.

Although I am inclined to agree with the majority that there may be sufficient evidence to permit a reasonable inference of Gibbs's initial complicity in the enterprise, I strongly believe that the admission of the double hearsay statements constitutes serious and therefore reversible error because it deprived Gibbs of his sixth amendment right to confrontation. Because the independent evidence upon which the Government relied for introduction of the out-of-court statements was so tenuous,[4] it was highly important that any

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4. I do not mean to suggest that there is anything improper in relying on a presumption to show the continuation of a person's participation in a conspiracy, but imposing such a presumption upon slight independent evidence implicating the defendant in the

out-of-court statements be unequivocal and that the declarant be subject to searching cross-examination.

In *Dutton v. Evans*, 400 U.S. 74 (1970), the Supreme Court recognized that the confrontation clause and the hearsay rule "stem from the same roots," but stated that "the Court has never equated the two, and we decline to do so . . . ." *Id.* at 86. The confrontation clause issue and the evidentiary question therefore must be separately analyzed, and the sixth amendment may require the exclusion of evidence even though admissible under Fed. R. Evid. 801(d)(2)(E). *See United States v. Perez*, 658 F.2d 654, 660 & n.5 (9th Cir. 1981). *See also United States v. Palumbo*, 639 F.2d 123, 131 (3d Cir.) (Adams, J., concurring), *cert. denied*, 454 U.S. 819 (1981); *United States v. Puco*, 476 F.2d 1099, 1102 (2d Cir.), *cert. denied*, 414 U.S. 844 (1973).

In *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980), the Supreme Court identified two restrictions that the confrontation clause places on the use of hearsay evidence in criminal trials. First, the prosecution generally must establish that the hearsay evidence is necessary because the declarant is unavailable. Second, the hearsay statement must be reliable. "Reflecting its underlying purpose to augment

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conspiracy only highlights the utter absence of flesh and blood in the Government's case upon which to rest the hearsay statements of a non-testifying conspirator.

The crucial portion of the alleged coconspirator statements were made approximately six months after Gibbs's April 7 meeting in Quakertown. To accomplish the admission, the Government relied upon a presumption that once it established Gibbs's participation in the conspiracy, membership continued thereafter until October 1980 unless he proved by affirmative acts inconsistent with the object of the conspiracy that he had withdrawn. There is no evidence in this record that Gibbs withdrew from the conspiracy after April.

accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" *Id.* at 65 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934)). In the instant case, the necessity aspect of this test has not been met. Therefore, there is no need to reach the question whether the reliability prong has been satisfied.

Although the literal language of the sixth amendment guarantees to any accused "the right . . . to be confronted with the witnesses against him," the Supreme Court has recognized the necessity that extrajudicial statements sometimes must be used because of the declarant's unavailability. Gibbs maintains that Quintiliano was not legally unavailable to testify and that therefore there was no need for introduction of his out-of-court statements. The Government contends that a showing of unavailability is not required.

The Supreme Court discussed the unavailability component of the confrontation clause in *Ohio v. Roberts*, *supra*:

> [I]n conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.

448 U.S. at 65. A witness may be deemed "unavailable" only if the prosecution has made "a *good faith effort* to obtain his presence at trial." *Id.* at 74 (emphasis in original) (quoting *Barber v. Page*, 390 U.S. 719, 725 (1968)). And, under the foregoing language in *Ohio v.*

Roberts, it is *the prosecution* that must produce or demonstrate the unavailability of the declarants. The Court did not impose any burden on *the accused* to show that the declarant is available.

Quintiliano was a codefendant in the Government's prosecution who had pled guilty to two of the three counts in the indictment and was still awaiting sentencing at the time of Gibbs's trial. There is no evidence in the trial record that bears on Quintiliano's availability. Although Quintiliano was faced with an impending sentencing proceeding and might not have been willing to waive his fifth amendment right and testify against Gibbs, there is a possibility that he would have because he had already pleaded guilty. Because there is nothing in the record to indicate that the Government ever established that Quintiliano would refuse to testify against Gibbs, the Government failed to carry its burden under *Ohio v. Roberts*, *supra*, 448 U.S. at 74-75, to demonstrate the declarant's legal unavailability.

In a footnote, the *Roberts* Court suggested that "[a] demonstration of unavailability, however, is not always required," *id.* at 65 n.7. To support this proposition, the Court cited *Dutton v. Evans*, 400 U.S. 74 (1970), in which it had permitted the admission of coconspirator hearsay in circumstances where a seemingly available declarant was not called to testify. The *Roberts* Court described *Dutton* as a case where the requirement of unavailability could be dispensed with because "the utility of trial confrontation" would have been "remote." *See* 448 U.S. at 65 n.7; *United States v. Perez*, *supra*, 658 F.2d at 661. Here, Quintiliano's statements do not fall within the *Dutton* exception to the unavailability requirement because they are crucial to conviction, and not "of peripheral significance at most," as in *Dutton*, *supra*, at 87. Moreover, in *Dutton*, the Court pointed out that the accused there had full

opportunity to cross-examine the declarant as to whether he actually heard the person make the statement offered in evidence.

The instant case is also distinguishable from *Dutton* because the Government has not carried its burden of showing that Quintiliano's hearsay statements were "marked with such trustworthiness," *Ohio v. Roberts*, *supra*, 448 U.S. at 65, to justify disregarding the unavailability requirement. I can conceive of possible motives Quintiliano might have had to misrepresent Gibbs's involvement in the crime.[5] For example, Quintiliano may have misrepresented Gibbs's involvement to reassure his coconspirators that plans for the sale of the contraband were proceeding smoothly. In addition, it is plausible that the statements were contrived as part of Quintiliano's bargaining strategy. Quintiliano may have seen a chance of pressuring the Florida buyers to offer better terms by giving the impression that he had another buyer waiting in the wings. Under these circumstances, the cross-examination of the testifying witnesses (White and Bilella) could not adequately test the truthfulness of Quintiliano's statements.

Most important, I believe that the instant case falls outside the *Dutton* exception to the unavailability requirement because I do not believe Quintiliano's hearsay statements were only "of peripheral significance," *see* 400 U.S. at 87, in the prosecution's

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5. It is true, of course, that Quintiliano's statements were against his penal interest because they disclosed his own complicity in the conspiracy. But this fact is hardly conclusive of the statements' reliability, particularly because the critical portions of Quintiliano's statements -- his references to Gibbs -- were not against his penal interest. *See* Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 Harv. L. Rev. 1378, 1395 (1972).

case. The challenged statements provide direct incriminating evidence, in the form of Quintiliano's declaration that Gibbs had agreed to buy the marijuana. Admittedly, there is some other evidence linking Gibbs to the conspiracy. However, unlike *Dutton*, where the disputed evidence consisted of a single sentence reported by one of twenty witnesses, the coconspirator hearsay presented in Gibbs's trial was the core of the Government's case.[6]

The opportunity to cross-examine an accuser or a critical witness is a powerful tool in the search for truth and in the assessment of guilt or innocence. The confrontation clause, in the words of the Supreme Court, contemplates

> "a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

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6. The instant case is distinguishable from United States v. *Weber*, 437 F.2d 327, 337-40 (3d Cir. 1970), *cert. denied*, 402 U.S. 932 (1971). In *Weber*, this court upheld against a constitutional attack the use of a coconspirator's out-of-court statement against the accused. Three factors distinguish *Weber* from the instant case. First, the hearsay evidence in *Weber* presented the "traditional hallmarks of reliability, because they were uttered spontaneously and they were against [the declarant's] penal interest." *Id.* at 340. Here, there are significant doubts about the reliability of Quintiliano's statements. Second, the coconspirator statements in *Weber* were not crucial to the case, as they are here. Third, there was an absolute necessity for admission in *Weber* because the declarant had died before trial.

Ohio v. Roberts, *supra*, 448 U.S. at 63-64 (quoting *Mattox v. United States*, *supra*, 156 U.S. at 242-43). Because the right of confrontation is so important in our adversarial system, it may only be denied in exceptional situations. The Government has not met its burden to show that the instant case is such an exceptional situation. The prosecution has failed to establish either that the declarant cannot be produced for trial or that the hearsay is sufficiently reliable and insignificant to justify dispensing with a showing of unavailability.

The admission of Quintiliano's statements without giving the defendant the opportunity to cross-examine the declarant sharply tipped the scales of justice against the defendant. The historic safeguard guaranteeing the accused the right to be confronted with the witnesses against him may not be disregarded.

III.

The majority, however, does not reach the merits of the sixth amendment issue because it asserts that "Gibbs did not preserve that issue for appeal [and therefore] it cannot serve now as a basis to reverse Gibbs's conviction." Typescript op. at 22. But the issue was raised in the trial court, perhaps not as specifically or as timely as it might have been, but it was raised sufficiently to be preserved and heard.[7]

First, the defendant repeatedly objected during the Government's case in chief to the admission of Quintiliano's statements on the ground that they failed

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7. The majority asserts that the issue was never raised by Gibbs during trial. "Had Gibbs by a specific objection, timely made, alerted the Government and the district court to the fact that no proof of unavailability had been presented by the Government, that deficiency could have been cured." Typescript op. at 22.

to satisfy Fed. R. Evid. 801(d)(2)(E). Although these objections did not specifically refer to the sixth amendment issue, they should have sufficed to put the trial judge on notice that intertwined with them was a constitutional issue. *See State v. Poole*, 572 P.2d 320 (Or. App. 1977) (objection only on the ground of hearsay was so closely related to the incompetency of the witness as to preserve for appeal the challenge based on the incompetency of the witness). Second, if there was any doubt concerning notice to the Government and the court, it was resolved when the Government rested without calling Quintiliano or producing proof of his unavailability. Only at that point could Gibbs have been certain that he would be denied his constitutional right to confront his accuser. He therefore moved, while the court, jury, and counsel were still present, to strike the hearsay, stating:

> [A]side from the co-conspirator exception to the hearsay rule, there is a clear Sixth Amendment problem in this case, and the co-conspirator hearsay rule which permits the introduction of co-conspirator hearsay does not subsume and take place of the sixth amendment right to confrontation . . . [and] the other cases have recognized that there is still, notwithstanding the existence of 801(d)(2)(E) . . . a sixth amendment right of a defendant to confront and cross-examine his accusers.[8]

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8. Defense counsel further stated in support of his sixth amendment objection: "The men who should have been on that witness stand and . . . whom I should have been able to cross-examine [were] Joe Quintiliano [and his brother] Jerry Quintiliano, the declarant[s] of the hearsay statement[s], and I have been denied through this case the right to confront and cross-examine . . . the ultimate accusers in this case . . . Joseph and Jerry Quintiliano." (453a)

(452a-453a) If the Government desired to cure the defect, it could have done so readily at that time. It did not.

The majority asserts that if the defendant had objected when the Government sought to introduce the testimony of White and Bilella that "would have warned the Government of the need to call Quintiliano or to prove his unavailability in other ways." Typescript op. at 29. As a matter of trial management, it would, of course, have been desirable for the defense to have specifically objected at the time on the sixth amendment ground, but not because the Government had to be warned of the need to call Quintiliano or prove his unavailability. The Government should have known that under *Ohio v. Roberts*, "In the usual case . . . the prosecution must either produce, or demonstrate unavailability of, the declarant whose statement it wishes to use against the defendant." *See infra* at 7 Calling Quintiliano or proving his unavailability was, as the majority recognizes, "a relatively simple matter for the Government." Typescript op. at 26. Taking such action when the motion to strike was tendered may have been an inconvenience for the Government, but an inconvenience so trivial should not be used to nullify an important constitutional safeguard.

Finally, the majority assumes that the district court overruled the defendant's sixth amendment objection on the ground that it was untimely. It therefore declares that "the trial judge's determination of timeliness" can only be reversed for an abuse of discretion. Typescript op. at 30. The record, however, does not support this assumption. The trial judge heard and considered the defendant's sixth amendment motion to strike *before* the defense opened its case; he did not reject the motion as "untimely." In fact, he made no ruling at all with respect to this constitutional issue. After hearing arguments of

defense counsel and the prosecution when the Government rested, the trial judge either ignored the sixth amendment motion or impliedly equated it with the coconspirator exception. He only ruled: "We find that the Government has established the existence of an alleged conspiracy and the connection of each defendant with it by a clear preponderance of the evidence independent of the hearsay declarations." (480a) This was the substance of the district court's ruling to the defense arguments on the coconspirator statements and the sixth amendment motion to strike the testimony. Thus, as this record stands, the court did not reject the sixth amendment motion on the ground of untimeliness. The prosecution raised no objection to the motion on the ground of untimeliness. The untimeliness question was raised for the first time by Judge Garth *sua sponte* in his dissent from the panel opinion. (Slip op. at 30.)

In any event, the confrontation issue is significant to the fact-finding process and to the ultimate determination of guilt or innocence. If the objection was not timely raised, this court may nonetheless take notice of the issue under the plain error rule.[9] The denial of the right to cross-examine the declarant of the hearsay statements, especially under the circumstances we have here, violated a fundamental right of the accused and constituted serious prejudicial error. *United States v. McKinney*, 707 F.2d 381 (9th Cir. 1983); *United States v. Provencio*, 554 F.2d 361 (9th Cir. 1977); *People v. Marine*, 362 N.E.2d 454 (Ill.

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9. Fed. R. Crim. P. 52(b) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Plain error has been defined as "serious and manifest" or "seriously prejudicial error" or "grave errors which seriously affect substantial rights of the accused." United States v. Morales, 477 F.2d 1309, 1315 n.17 (5th Cir. 1973). *See* United States v. Nobel, 696 F.2d 231, 237 (3d Cir. 1982).

App. 1977). "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice error to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Silber v. United States*, 370 U.S. 717, 718 (1962) (per curiam) (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

Courts have found no difficulty in reviewing a sixth amendment issue under the plain error rule for the waiver of fundamental constitutional rights "is not lightly to be found." *United States v. Provencio*, *supra*, at 363. In *United States v. McKinney*, 707 F.2d 381 (9th Cir. 1983), the defendant, as in this case, was convicted on Government testimony that constituted double hearsay. Although the sixth amendment issue was neither raised in the district court nor briefed or argued on appeal, the circuit court *sua sponte* considered the issue under the plain error rule and reversed. In *United States v. Provencio*, *supra*, the court held that the introduction of depositions without any proof that the deposed witnesses were unavailable was such an obvious violation of the accused's rights to confrontation that "it is unnecessary for us to decide whether the error in admitting the evidence without objection was plain error." 554 F.2d at 362. The court refused to imply a waiver of a fundamental right from the failure of the defense counsel to object at the time of trial. *Id.* at 363.[10]

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10. Other federal courts that have on appeal reviewed a confrontation argument, although the issue was not specifically raised at trial, include: United States v. Escobar, 674 F.2d 469 (5th Cir. 1982) (admission of officer's testimony constituted plain error affecting substantial rights that court will review even absent timely objection at trial); Naples v. United States, 344 F.2d 508

In *People v. Marine*, 362 N.E.2d 454 (Ill. App. 1977), the appellate court reviewed a confrontation issue although the defendant had objected at trial only on the ground of hearsay. In rejecting the state's argument that the defendant had waived the confrontation issue by only objecting on the ground of inadmissible hearsay, the court stated: "Even if we were to find a waiver of this issue for purposes of appeal, we regard the right to confrontation to be of such significance as to involve the application of the plain error rule." *Id.* at 458 (citations omitted).

IV.

In summary, I believe that the sixth amendment issue was timely raised, even if the objection came at the close of the Government's case. Had it not been

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(D.C. Cir. 1964) (reception of double hearsay reviewed as plain error although not raised below); United States v. Dunn, 299 F.2d 548 (6th Cir. 1962) (receipt of inadmissible hearsay that was the only evidence sufficient to make prosecution's case reviewed by appellate court on its own motion).

In this court, we have often applied the plain error rule, sometimes in cases that did not even involve fundamental rights of the accused. *See*, e.g., United States v. Logan, 717 F.2d 84 (3d Cir. 1983) (failure to preserve issue of trial court's failure to instruct on character witness reviewable as plain error); Government of the Virgin Islands v. Joseph, 685 F.2d 857 (3d Cir. 1982) (submission to jury of defendant's confession and minister's letter when not admitted of record reviewable as plain error); Government of the Virgin Islands v. Brown, 685 F.2d 834, 839 (3d Cir. 1982) ("[t]he omission of an essential element of an offense in the charge to the jury ordinarily constitutes plain error, even in the absence of objection."); United States v. DiPasquale, 677 F.2d 355, 359 n.10 (3d Cir. 1982) (submission of case to jury despite failure to renew motion for judgment of acquittal at close of all the evidence reviewable under plain error rule); Beardshall v. Minuteman Press Int'l, Inc., 664 F.2d 23 (3d Cir. 1981) (erroneous instruction on burden of proof in civil case reviewable under plain error rule despite counsel's failure to object).

timely, this court should review the issue under the plain error rule both because fundamental rights are involved and because the Government's case rests largely on untested, devastating hearsay. Because the defendant has been denied the right of confrontation and cross-examination, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal," *Barber v. Page*, 390 U.S. 719, 721 (1967) (quoting *Pointer v. Texas*, 380 U.S. 400, 405 (1965)), the judgment of conviction should be reversed and the case remanded for a new trial.

SEITZ, *Chief Judge*, dissenting.

I am in agreement with all the basic conclusions reached in Judge Rosenn's dissent.[1] I write separately because Judge Rosenn would order a new trial while I would vacate and remand to afford the government an opportunity to discharge its burden of showing that Quintiliano was unavailable at the time of the trial. *See* 28 U.S.C. § 2106.

The only issue dividing the court concerns a possible violation of the Confrontation Clause. I agree with Judge Rosenn that there was a violation of the Confrontation Clause if Quintiliano was available at the time of the trial. On the other hand, if the government can present clear and convincing evidence at a hearing that it made a "good faith effort" to obtain Quintiliano's presence at trial, *see Ohio v. Roberts*, 448 U.S. 56, 74 (1980), or that such an effort would have been clearly unavailing, then I believe the government will have satisfied the unavailability requirement of the

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1. I do not find it necessary to join Judge Rosenn's plain error discussion.

Confrontation Clause.[2] This would correct the erroneous ruling of the district judge at the trial. I can think of no legitimate societal purpose to be served by ordering a new trial, unless such a hearing would debase the values inherent in the Confrontation Clause.

I assume that the objection to a later hearing on the unavailability issue would be based on the problems inherent in reconstructing the situation that existed at the time of the trial. It seems to me that the heavy burden on the government at such a hearing, together with the requirement that the district court make a reasoned determination, subject to appellate review, provides meaningful assurance that a defendant will not be impermissibly deprived of his Confrontation rights.

I recognize the concern expressed by the then Chief Judge Bazelon in his dissent in *Henderson v. United States*, 349 F.2d 712 (D.C. Cir. 1965), that a remand places what amounts to a psychological burden on the defendant because of the court's awareness of the conviction. However, I believe the safeguards afforded, including appellate review, sufficiently protect a defendant's Confrontation rights. Indeed, the nunc pro tunc hearing approach to the suppression of evidence which was approved in *Jackson v. Denno*, 378 U.S. 368, 394 (1964), certainly implicated a defense interest every bit as important as that here implicated. *Compare Government of the Virgin Islands v. Smith*, 615 F.2d 864 (3rd Cir. 1980).

Thus, while I join the basic conclusions in Judge Rosenn's dissent, I would vacate and remand for an evidentiary hearing on the unavailability issue and, if pertinent, the trustworthiness issue.

I therefore dissent.

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2. It would be for the district court to consider the "trustworthiness" issue if it determined that Quintilliano was unavailable.

A True Copy:

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Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1096

UNITED STATES OF AMERICA

v.

GIBBS, STEPHEN a/k/a "Jake,"

Appellant

On Appeal From the United States
District Court For the
Eastern District of Pennsylvania
Crim. No. 81-00260-003

ORDER AMENDING DISSENTING OPINION

ORDERED that the following change be made in the dissenting opinion of Chief Judge Seitz in the above captioned matter:

at p. 43, line 24, delete the last two sentences of the paragraph, beginning with the word "Indeed . . ." and ending with ". . . (3d Cir. 1980)." and replace it with the following sentences:

Indeed, the nunc pro tunc hearing approach to the suppression of evidence which was approved in *Waller v. Georgia*, 52 U.S.L.W. 4618, 4620-21 (May 22, 1984), and *Jackson v. Denno*, 378 U.S. 368, 394 (1964), certainly implicated defense interests every bit as important as that here implicated. *Compare Government of the Virgin Islands v. Smith*, 615 F.2d 864 (3d Cir. 1980).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1096

UNITED STATES OF AMERICA
v.
GIBBS, STEPHEN a/k/a "Jake,"
Appellant

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGIN-BOTHAM, SLOVITER AND BECKER, *Circuit Judges*, AND ROSENN, *Senior Circuit Judge*

The petition for rehearing filed by appellant, Stephen Gibbs, in the above-entitled case having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

/s/
Circuit Judge

DATED: July 11, 1984